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# REPORTS

— OF —

CASES ARGUED AND DETERMINED

— IN THE —

CIRCUIT COURTS OF OHIO.

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**VOLUME XVII.**

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[Copyright.]

FROM JANUARY 1, TO JUNE 30,

1899.

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*CARL G. JAHN, Editor.*

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COLUMBUS OHIO:  
WEEKLY LAW BULLETIN, PRINT,  
1899.

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*Rec. Feb. - Oct. 1899.*

# JUDGES OF THE CIRCUIT COURT OF OHIO

(From January 1st, 1899, to February 9th, 1899.)

HON. JAMES L. PRICE, *Chief Justice*, Lima, O.  
Elected for the year 1899.

## FIRST CIRCUIT.

JOSEPH COX, *Presiding Judge* ..... Cincinnati  
JAMES M. SMITH, *Judge* ..... Lebanon  
PETER F. SWING, *Judge*..... Batavia

## SECOND CIRCUIT.

CHAS. C. SHEARER, *Presiding Judge* ..... Xenia  
AUGUSTUS N. SUMMERS, *Judge* ..... Springfield  
HARRISON WILSON, *Judge*..... Sidney

## THIRD CIRCUIT.

JAMES L. PRICE, *Chief Justice* ..... Lima  
JAMES H. DAY, *Judge* ..... Celina  
CALEB H. NORRIS *Judge*, ..... Marion

## FOURTH CIRCUIT.

THOMAS CHERRINGTON, *Presiding Judge*..... Ironton  
DAVID A. RUSSELL, *Judge* ..... Pomeroy  
HIRAM L. SIBLEY, *Judge*..... Marietta

## FIFTH CIRCUIT.

JOHN J. ADAMS, *Presiding Judge* ..... Zanesville  
SILAS M. DOUGLASS, *Judge*..... Mansfield  
JOHN M. SCHWARTZ, elected for the balance of the term of Judge Pomeroy,  
deceased, from Nov. 16, 1898, to Feb'y. 9, 1899. .... Newark

## SIXTH CIRCUIT.

EDMUND B. KING *Presiding Judge* ..... Sandusky  
GEORGE R. HAYNES, *Judge* ..... Toledo  
ROBERT S. PARKER, *Judge*..... Bowling Green

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SEVENTH CIRCUIT.

PETER A. LAUBIE, *Presiding Judge* .....Salem  
 WILLIAM H. FRAZIER, *Judge* .....Caldwell  
 JEROME B. BURROWS, *Judge*.....Painesville

---

EIGHTH CIRCUIT.

JOHN C. HALE, *Presiding Judge*.....Cleveland  
 ULYSSES L. MARVIN, *Judge* ....Akron  
 HUGH J. CALDWELL, *Judge* .....Cleveland

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CIRCUIT COURT OF OHIO.

From February 9, 1899, to July 1, 1899.

HON. JAMES L. PRICE, *Chief Justice*, Lima, O.  
(Elected for the year 1899.)

FIRST CIRCUIT.

JAMES M. SMITH, *Presiding Judge* ..... Batavia  
PETER F. SWING, *Judge* ..... Lebanon  
WILLIAM S. GIFFEN, *Judge*, (elected for full term to February 9, 1905, in place of Judge Cox, term expired).  
..... Hamilton

SECOND CIRCUIT.

AUGUSTUS N. SUMMERS, *Presiding Judge*..... Springfield  
HARRISON WILSON, *Judge*..... Sidney  
THEODORE SULLIVAN, *Judge*, (elected for full term to February 9, 1905, in place of Judge C. C. Shearer, term expired), ..... Troy

THIRD CIRCUIT.

JAMES L. PRICE, *Chief Justice* ..... Lima  
CALEB H. NORRIS, *Judge*..... Marion  
JAMES H. DAY, *Judge*, (re-elected for second term to February 9, 1905). ..... Celina

FOURTH CIRCUIT.

DAVID A. RUSSELL, *Presiding Judge*..... Pomeroy  
HIRAM L. SIBLEY, *Judge*..... Marietta  
THOMAS CHERRINGTON, *Judge*, (re-elected for fourth term to February 9, 1905), ..... Ironton

FIFTH CIRCUIT.

JOHN J. ADAMS, *Presiding Judge*..... Zanesville  
SILAS M. DOUGLASS, *Judge*, ..... Mansfield  
RICHARD M. VOORHEES, *Judge*, (elected for full term to February 9, 1905, in place of Judge John M. Schwartz, term expired). ..... Coshocton

## SIXTH CIRCUIT.

EDMUND B. KING, *Presiding Judge* ..... Sandusky  
GEORGE R. HAYNES, *Judge* ..... Toledo  
ROBERT S. PARKER, *Judge*, (re-elected for full term to Feb-  
ruary 9, 1905), ..... Bowling Green

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## SEVENTH CIRCUIT.

WILLIAM H. FRAZIER, *Presiding Judge* ..... Caldwell  
JEROME B. BURROWS, *Judge* ..... Painesville  
PETER A. LAUBIE, *Judge*, (re-elected for fourth term to Feb-  
ruary 9, 1905), ..... Salem

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## EIGHTH CIRCUIT.

ULYSSES L. MARVIN, *Presiding Judge* ..... Akron  
HUGH J. CALDWELL, *Judge* ..... Cleveland  
JOHN C. HALE, *Judge*, (re-elected for third term to Febru-  
ary 9, 1905), ..... Cleveland

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**CIRCUIT COURTS OF OHIO.**

---

(Eighth Circuit—Summit Co., O., Circuit Court—Nov. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

**THE CLEVELAND TERMINAL AND VALLEY RAILROAD  
COMPANY v. RAYMOND GILBERT MARSH.**

---

*Injury to infant while at work at railroad, engaged by an agent of R. R. Co. to do his work, without authority from Co.—*

An infant of between ten and eleven years of age, who is injured by the negligence of the employees of a railroad company while in the discharge of their work as such employees, is not necessarily precluded from a recovery against such company for such injuries, by the fact that at the time of such injury such infant was in the performance of work which it was the duty of an agent of the company to perform, the infant being engaged in such work by the employment of such agent of the company without any knowledge on the part of the company, and such agent being without authority from the company to so employ such infant.

---

Error to the Court of Common Pleas of Summit county.  
MARVIN, J.

The proceedings in this court are brought to reverse a judgment of the court of common pleas of this county rendered at the April term, 1898.

In the original action Raymond Gilbert Marsh, an infant, by his next friend Amanda M. Marsh, brought suit against the Cleveland Terminal and Valley Railroad Company seeking to recover for personal injuries sustained by

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VOL. XVII.—1

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C. T. & V. R. R. Co. v. Marsh.

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him on the 18th day of April, 1896, and which injuries, he says, were caused by negligence on the part of the railroad company.

The line of railroad owned and operated by the defendant below passes through the village of Myersville in this county, at which village is a station of said road.

The station agent at Myersville, at the time of this injury, was Milo Swinehart. A part of his duties was to place lighted lamps at switch stands north of the railroad station each evening at about dusk, and to take in such lamps on the following morning and clean and fill them preparatory to being again put out in the evening. At the time of the injury to the plaintiff complained of and for several months prior thereto, the plaintiff had performed the duty of placing these lamps in the evening, taking them in in the morning and preparing them again for use. This he did as an employe of Swinehart and not as an employe of the railroad company.

The line of the railroad, as it passes through the village and by the station at Myersville, is substantially North and South. A few rods North from the railroad station is a public highway running east and west. There is also a public highway leading to the southwest from Myersville, but extending no further north than the east and west road already mentioned. There is another public highway running north and south and passing the village of Myersville some twenty rods east of the railroad track.

At the time of the injury complained of, the plaintiff was ten years and about eight months of age. On the evening of the date already given, between five and six o'clock, he started out from the engine-house of the railroad company which is near to the station, to the north with two switch-lamps in his hands, ready to be placed at the switch-stands. He placed one of them at a point a little south of the east and west road already mentioned, then passed along across



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the public highway for the purpose of placing the other lamp. Before reaching the switch-stand, however, the plaintiff observed an object lying upon the track, which turned out to be what is known as a signal torpedo, a small metallic device containing a highly explosive substance.

Upon noticing this, he placed his lamp upon the ground and proceeded to investigate this torpedo, striking it with a stone which caused it to explode, from which explosion he was very seriously injured, resulting in the loss of one eye.

On the part of the plaintiff below it is claimed that this torpedo was placed upon the track by some agent or servant of the railroad company, and that so placing it and leaving the same was well known and acquiesced in by the company, and was negligence on the part of the company in view of the further claim that this part of the right of way of the railroad company between the east and west road and the switch-stand where he was to place the lamp which he still had with him at the time of the injury, and on for a considerable distance further north, was at the time of the injury, and for a long time prior thereto had been, used by the public, including children, as a thoroughfare for pedestrians where they were accustomed habitually to walk between the village of Myersville and localities farther north, and that this use was well known and acquiesced in by the railroad company.

A considerable number of witnesses were introduced by the plaintiff, on this subject; among them, the plaintiff himself, Isaac J. Kramer, Wilson Myers, Clyde Treash, and John J. Marsh—the grandfather of the plaintiff. The question of this use, by the public, including children, of the right of way, was fairly submitted to the jury, and if the witnesses named and others who testified on the subject on the part of the plaintiff, were believed by them, the finding that the right of way was so used, was justified.

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The question of whether such use by the public was material in the case is considered later in this opinion.

The claim is further made on behalf of the plaintiff below, that the railroad company, through its officers and agents, had knowledge of the employment of the plaintiff by Swinehart, and were bound to conduct the operations of the road at Myersville with reference to such employment. This question will also be considered later in the opinion.

The trial in the court of common pleas resulted in a verdict and judgment for Marsh. Motion for a new trial was filed and overruled and proper exception taken.

The railroad company, by its amended answer upon which the case was tried, denied that it was responsible in any way for the presence of this torpedo upon the railroad track. It denied that it was negligent in any manner contributing to the injury of the plaintiff, and alleged that whatever injury was sustained by the plaintiff, was contributed to, if not entirely, caused by his own negligence.

Numerous exceptions were taken by the railroad company to the rulings of the court at the trial upon the introduction and rejection of evidence.

Dr. M. M. Bauer, a witness on the part of the plaintiff, who was called for the purpose, among other things, of making it appear to the jury that the torpedo was placed upon the track by an employe of the company after having received it from Swinehart, another employe of the company, testified to having been in the station of the defendant company at Myersville on the day of the injury, at about the middle of the day, and to having then overheard a conversation between Swinehart, the station agent, and another man whom he designates as "one of the train crew" (there was standing at the time at Myersville a freight train). He states that he did not know this man, but that he was "one of the train crew".

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A motion was made to take this statement from the jury on the ground that the testimony of Dr. Bauer showed that he did not know whether or not the party whom he thus designated, was a member of the crew connected with the train of the railroad company. It is urged that as he did not know the man, and does not describe him, he could not have known whether or not he was one of the train crew.

The court overruled the motion, and, we think, correctly. The witness might well be warranted in saying that the man was "one of the crew" of a railroad train, by his appearance, his being with the train, his conduct in regard to the train, and though he might be mistaken in supposing one who to all appearance was a member of the crew, to be such member, still we think that the answer which he gave should not have been taken from the jury. Suppose that Dr. Bauer had not known Mr. Swinehart at all, but had stepped into the railroad station at Myersville, found him in the office, asked for a ticket to Akron or elsewhere, purchased it from him and paid for it to him, would it be claimed that he might not say that he saw and purchased a ticket from the station agent although it might turn out that he was mistaken in this and that some person had impersonated the station agent? Still the court would hardly be justified in saying that the answer made by the witness, that he purchased a ticket of the station agent, should be taken from the jury.

Dr. Bauer heard something said by this train-man to the station agent, but did not understand what it was. He heard the agent answer, however, "Here is one; I have got one". The agent then stepped to a cupboard which was in his room, and took therefrom an object which Dr. Bauer says he distinctly saw; and the station agent then said: "Yes, here is one; I have got one;" and he saw this taken by the train-man, who thereupon went out of the station and to the north toward the rear of his train. Dr. Bauer says that at

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the time he did not know what this object was, but he now knows it was a signal torpedo.

The railroad company asked that this evidence be taken from the jury, and its motion was overruled.

It is urged that since Dr. Bauer did not at the time know that this was a signal torpedo, he ought not to be permitted to say that he now knows that it was, because it is said that at the best such knowledge must be simply hear-say. We do not regard the act of the court in this matter as erroneous. Dr. Bauer may very well have since learned that the object which he saw distinctly on the 18th day of April, 1896, and the name of which or the character of which he did not then know, is a signal torpedo, and this not by hear-say in the sense in which that term is used in the law of evidence, but by actual knowledge.

It can hardly be said that each of us has not often seen some object which at the time he did not know the name of or the character of, but which he later became so familiar with as to know certainly what the object which he saw was. To hold otherwise would be to hold that one may not learn so as to certainly know what a given thing is that he did not know the name of or the character of when he first saw it.

Milo Swinehart was called as a witness by the defendant, and upon his cross-examination was asked if he did not on the evening of the day of the accident, at the home of the plaintiff's mother, say to her "This is the torpedo that he struck; he may have known what it was, but he did not know that it was explosive. It is hard for a boy of his age to know that they were explosive." Objection was made to this, and the objection was overruled. It is urged that this was error.

In his direct-examination Swinehart had testified that he had told the plaintiff at a time when he was in his office, what these torpedoes were (there being several of them

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present, and the plaintiff examining them), and that he then told him that they were explosive; that he must not handle them because they were explosive and might hurt him. Clearly the question asked in cross-examination was to test the credibility of the witness and, if possible, get an admission from him that he had made a statement out of court wholly inconsistent with his statement in court. Upon being permitted to answer, the witness said, "No, sir."

Thereafter the plaintiff's mother was upon the stand, and was asked about this conversation at her house, and testified that Swinehart did say at her house at the time referred to in the question put to him in cross-examination that the plaintiff knew what the torpedo was, but did not know that it was explosive. This, although objected to, was permitted to be answered, and an exception taken. As this was directly in contradiction of the testimony given by Swinehart, it was proper.

Dr. Bauer was again called by the plaintiff in rebuttal, and asked and, over the objection of defendant, permitted to answer this question:

"At the time you testified before that you were in the freight department of the station there and someone came in and had a conversation with Milo Swinehart, I will ask you if you saw Milo Swinehart, give to this man a car seal?"

And also this question:

"Was it one of those locks that he gave to this man?"

Each of these questions was answered in the negative, and a proper exception was taken. It is urged on the part of the plaintiff in error that answers to these questions should not have been permitted, because nobody had testified that at the time referred to, Swinehart gave to anyone either a car seal, or a car lock; but Swinehart in his direct examination had testified that in the cupboard from which Dr. Bauer says the torpedo was taken, there were at the

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time car seals and car locks, and he describes each of them. The object of the railroad company in eliciting this testimony from Swinehart was clearly with a view to making the claim that if Dr. Bauer saw anything given to a trainman at this time, it was either a car seal or a car lock, and to rebut this was the object of the plaintiff below in asking the questions complained of, of Dr. Bauer.

Without doubt, since by the description of the car seal and car lock, neither of them was very dissimilar in appearance to the torpedo, the claim would have been made to the jury that the witness might well have mistaken one of those for a torpedo, and we think such claim would have been legitimate and that it was therefore, entirely proper to rebut such inference by asking these questions of the witness.

While John J. Marsh was upon the stand as a witness for the plaintiff and was being inquired of in reference to the use, made by the public of the portion of the right of way of the railroad company at the place referred to, he was asked "How often per week or day have you seen people go up and down the track?" And, again, this question:

"You do not quite understand my question. I do not mean how often have you seen a particular person go up and down the track, but how often have you seen people go up and down the track per week or month as the case may be." To each of these questions an objection was interposed and overruled, and a proper exception taken. It is said that this was permitting the witness to testify as to the use of the right of way by the public after the injury and up to the time of the trial. The witness had, prior to this time, testified that he had been the keeper of a grocery store at Myersville ever since the 1st of April, 1889, and that during all that time he had been familiar with the situation and use of the track and right of way. And then he had been asked this question, "About how many different people—state whom if anybody, you have seen coming

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or going up the track." This he answered, giving the names of fourteen people and then adding, "And you might almost include all the Milheim people; they would come down the track when coming to the store or to the post-office." In answer to another question he gave the names of other people whom he had seen going up and down the track. His attention had been called to the fact that what was wanted was the use of the track by people from 1889, the time when he began his residence at Myersville, to the time when the plaintiff was injured, and though the questions objected to may have included a later time, we think that neither the witness nor the jury could have been misled by supposing that it was the use made of the right of way after the accident, that was being inquired about.

Questions of evidence are made in the record, the correctness of the rulings upon which is involved in a discussion of still another question raised in various ways upon the record, and this is a question of whether the plaintiff, being at the time of his injury in the employment of Swinehart, an agent of the company who was entirely without authority on the part of the company to so employ him to do a part of his work, can have any right to a judgment in the action, even though his injury was without fault on his part and resulted from the negligence of a servant or servants of the company. It is said that one thus employed, is to be treated as a volunteer, that in no event can his rights be greater than those of one who voluntarily undertakes to assist the servants of the railroad company. This question is raised in the motion which was made to take the case from the jury at the close of the plaintiff's evidence. It is raised in the motion for a new trial, in the exceptions taken to the charge of the court, the exceptions to a refusal of the court to charge the requests of the defendant, and, as already said, in rulings upon questions of evidence.

In *Harriman v. Railroad Company*, 45 Ohio St., 11, our

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supreme court hold that where a railroad company has for a long time permitted the public, including children, to travel and to pass habitually over its railroad at a given point without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care, having due regard to such public use and proportioned to the public danger to persons so using its road.

So that, if the plaintiff was entitled to the same protection from the railroad company as children generally, and if the jury found the other necessary facts, the railroad company might be liable.

The question, therefore, arises, whether by reason of the plaintiff's being engaged in work under employment of Swinehart, which it was the duty of the latter to perform for the railroad company, he lost the rights to which he would have been entitled as one of the general public.

It is said that as Swinehart employed this boy without authority, to allow a recovery here would be in violation of well-settled principle of law.

Numerous cases support the proposition that a servant can not by any act of his in the employment of another impose upon the master a higher liability for negligence than the master is under to the servant himself.

Barstow v. Old Colony R. R. Co. 143 Mass., 535; Johnson v. Ashland Water Co., 71 Wis., 553; Wischan v. Richards, 136 Penn. St., 109; Plower v. Penn. Co., 6 Am. Rep., 251; Osborne v. Knox & Lincoln R. R. Co., 68 Maine, 49.

The same proposition is sustained in Bailey's Personal Injuries, sec. 5255.

The same authorities and many others support the general proposition that one who assists in performing the work of a master, either voluntarily without request from anybody,



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or at the request and by employment of a servant of the master, assumes all the liability of a servant of the master, and is entitled to no protection against the negligence of the servants of the master to which he would not be entitled as a fellow servant with them. See Wood's Law of Master and Servant, sec. 455 and authorities there cited.

These authorities, however, are dealing with cases where the party seeking to recover is old enough to understand and appreciate the danger to which he subjects himself when he undertakes the work.

It would seem that the age and capacity of the plaintiff below in this action should not be overlooked in determining his rights here.

In *Gulf, Colorado & Santa Fe R. R. Co. v. Jordan Jones*, 76 Texas 350, a recovery was allowed to a negro boy sixteen years old, who was injured by the railroad company while serving it as a temporary brakeman. The first clause of the syllabus in that case read:

"If the minor had not the mental capacity and experience to appreciate the danger and if he be employed in a dangerous business, not by the contract of the parent, and if he be injured as the result of his inexperience, the master ought to be held liable."

In *Rhodes v. Georgia R. R. and Banking Co.*, 84 Ga., 320—20 Am. St. Rep., 362—The supreme court of Georgia reversed a judgment of the trial court which sustained a demurrer to a declaration which alleged that an infant son of the plaintiff was killed by the negligence of the defendant while aiding in moving by hand a certain car. The decedent was not in the employ of the company, but was helping to move the car at the request of a servant of the company. The decedent was thirteen years old. The opinion in this case fully recognizes the proposition that a person who assumes to assist the servant of another, such servant having no authority to employ assistance, if, while thus acting, is injured, has no right of action against the master

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for his injury, and this upon the ground that he is a mere volunteer. The court uses this language: "If the person were an adult, there would clearly be no liability on the part of the company; but, as the declaration alleges that the person thus injured was of the tender age of thirteen years, whether the company would be liable or not would depend upon the amount of discretion and knowledge which such infant had at the time."

It must be borne in mind, too, that the plaintiff below claimed and introduced evidence tending to show that the portion of the railroad grounds where this boy was injured, was and long had been in common use by the public, including children, as a pathway for pedestrians, with the full assent and acquiescence of the railroad company. If this claim was established, then the plaintiff, as one of the public, might have been at the place where he was injured, and be entitled to a higher degree of care on the part of the company than one of its servants would have been; and it may well be doubted whether the simple fact that he was sent out by an employe of the company deprived him of the rights which another boy, not so employed, of the same age and capacity, would have had if he had been injured in the same way as the plaintiff.

To hold that the mere fact that the plaintiff was at the place where he was injured, at the request of Swinehart for the purpose of performing a duty which Swinehart was under contract with the railroad company to perform would prevent a recovery in this action, would seem to be to make the act of Swinehart in employing the plaintiff, have the effect of relieving the company from a duty which it otherwise owed to the plaintiff.

If the use of the grounds of the company by the public at the place where the injury occurred, was such as is claimed by Marsh, then the company owed a duty to him, as one of the general public, from the performance of which,

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we hold, it was not released by the mere fact he was at the time, in the performance of work at the request of Swinehart which the latter should have performed himself

We are not prepared to say that the mere fact that this boy was engaged in aiding the station agent in the discharge of his duties and at his request, deprived him of the protection to which he was entitled had he been at the place where he was, without being thus employed.

That he was there for the sole purpose of performing this work which it was the duty of Swinehart to perform, is substantially found by the jury in answer to the first two questions propounded to them for special findings, and we treat the case as though the first question had been distinctly answered to that effect.

Entertaining the views which we do, the answers made to the third and fourth interrogatories propounded to the jury, are not important.

As to the fifth interrogatory, the answer to which is complained of, it is for the same reason not important; but we think that the defendant was not entitled to have this question answered.

Question 3, which reads: "Does the evidence establish to your satisfaction that any agent or representative of the company other than Swinehart, the station agent, had knowledge that prior to the accident the plaintiff was accustomed to pass up and down the track to attend to the switch lights?" calls for the finding of an ultimate fact; and Question 5, which reads: "If you answer Question 3 in the affirmative, please state the facts which you find established by the evidence and which leads you to your affirmative conclusion", calls upon the jury to state probative facts from which they find the ultimate fact called for in Question 3. This we do not think is contemplated by the statute.

If we are right in what we have already said, then the

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questions raised in the record as to the admission of evidence upon the use by the public of the right of way of the railroad company as a thoroughfare for pedestrians, were properly disposed of by the court. And the first five requests to charge, made by the defendant below, were properly refused. The first of these requests reads:

“If you find that at the time the plaintiff, Raymond Gilbert Marsh, received his injury, he was on the property of the railroad company for no purpose except to place the north switch light in position pursuant to the request of the station agent Swinehart, then I say to you that the fact that the railroad company had permitted the public to travel over this part of its property without objection, would not entitle the plaintiff to receive at the time of his injury that degree of protection from injury which such public would have been entitled to receive, nor that degree of protection he would have been entitled to receive had he been upon the property as one of the public.”

The second, third and fourth requests are based upon the same view of the law, and, for the same reason that the first request was properly refused, each of the others was properly refused.

The fifth request which reads:

“The petition in this case does not aver that the defendant had knowledge of the fact that the plaintiff was lighting and carrying the switch lamps back and forth or that the plaintiff was going back and forth along the railroad for any purpose, and, unless you can find from the evidence that the injury to the plaintiff was wilfully and intentionally caused by the defendant, then your verdict should be for the defendant.”

This request was properly refused if, as we hold the law to be, this plaintiff was entitled to the protection to which he would have been entitled as one of the general public.

The request was framed upon the theory that the plaintiff being at the place where the injury occurred, for the sole purpose of doing the work of Swinehart, could not recover

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unless he brought home to the railroad company knowledge that he was thus employed. It has already been said that we hold such knowledge on the part of the company was not essential to a recovery by Marsh.

Exception is taken by the plaintiff in error to several propositions given in the charge to the jury. These propositions thus excepted to, are, some of them, direct quotations from the syllabus and the opinion in the case of *Harriman v. R. R. Co.*, supra, and if the law of that case is properly applicable to this case, no error was committed in the giving of these propositions.

It is said that the charge as a whole is misleading. And this would be true if the law is, as claimed by the plaintiff in error, as to the rights of this boy while engaged in the performance of the duties which Swinehart was under obligation to perform for the company; but, as we hold Marsh is not precluded from recovery solely because he was in the discharge of duties which Swinehart had undertaken to perform for the company, we hold that there was no error in the charge of the court as given. We find no error in the record prejudicial to the plaintiffs in error.

And the judgment of the court of common pleas is affirmed.

*Allen & Cobbs*, for Plaintiff in Error.

*Tibbals & Frank*, for Defendant in Error.

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(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1898.)

Before Smith, Cox and Swing, JJ.

SUSAN W. LONGWORTH v. THE CITY OF CINCINNATI et al.

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*The Cincinnati "Alley Law" (90 O. Loc. L., 238) unconstitutional as to alleys previously improved.*

The act of March 30, 1893, (90 Ohio Local Laws, 238) provides "that in cities of the first grade of the first class, the board of administration shall have authority to cause any alley of

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said city that is twenty feet or less in width, to be improved with such material as said board shall deem best," and further that "the entire costs of such improvement except the costs of intersections and two per cent. of the entire cost which shall be paid by the city, shall be assessed upon the parcels of lots and lands bounding or abutting upon the improvement in the manner provided by law;" while the general statute, sec. 2298, R. S., provides that "If the costs of improving a street, alley or other public highway have been paid by the abutting property owners and the grade remaining unchanged it becomes necessary to re-pave such street, alley or highway, one-half of the costs and expenses of such re-paving shall, if the council deem it just, be placed on the general tax list of all taxable property in the corporation, and collected as other taxes are collected, and applied to such cost and expense of repaving."—It therefore deprives owners of lots abutting on alleys of 20 feet or less in width in cities of the first grade of the first class, of rights which owners of lots abutting on alleys generally enjoy, and so far as alleys that were once improved and that are repaved without changing the grade thereof, located in such cities, are concerned, is in conflict with sec. 6, art. 13, of the constitution of Ohio.

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SWING, J.

This is an action against the defendants to enjoin the collection of certain assessments made by said city, on the property of the plaintiff abutting on Fugate alley in said city, for the improvement of said alley. Said improvement was made under and in accordance with the act of the legislature of the state of Ohio, passed March 30, 1893, found on page 238, 90 Ohio Laws.

The first section of the act provides:

"That in cities of the first grade of the first class, the board of administration of any such city, shall have authority to cause any alley of said city that is twenty (20) feet or less in width, to be improved with such material as said board shall deem best, and the method of procedure in such case shall be as follows:" etc.

The seventh section of said act provides:

"The entire cost of such improvement, except the costs

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of intersections and two per cent. of the entire cost which shall be paid by the city, shall be assessed upon the parcels of lots and lands bounding or abutting upon the improvement in the manner provided by law."

The other provisions of the act relate to the details of fixing the assessment and need not be here set forth.

It is claimed by the plaintiff that this law is unconstitutional in that it conflicts with sec. 26, art. 2, of the constitution. Probably no provision of our constitution has been so difficult to construe or has been so prolific of litigation as this one. That there should be such a provision in the constitution seems reasonable and proper, and yet when the classification of cities is granted by the constitution, it has been found very difficult to ascertain just what laws do and what laws do not contravene this section. This difficulty has been so great that our supreme court has repeatedly said that it will not attempt to give any general rule defining its scope, but will reserve to itself the right to decide every case as it comes before it. This court, however, in the case of *Ampt v. The City*, 12 C. C. 119, thought there was a general principle running through the decisions of the supreme court, and in deciding that case, used the following language, at p. 122:

"Other cases of the supreme court might well be cited upon this question, but they do not conflict with these. These cases clearly show the view taken by that court of this provision of the constitution, and while in each of these cases they say they will not lay down any general rule as to its meaning, but will reserve to themselves the right to pass every law as it comes before them, it seems to me that there is a rule deducible from these decisions, and that is this, that whenever any law directly operates on and affects the rights, privileges and interests of the citizens, and there is no reason why it should not operate on all the citizens of the state alike, it is a law of a general nature within the meaning of this section of the constitution, and should have a uniform operation through-

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out the state. But where a law relates to the government of cities and to the doing of corporate acts, and only indirectly affects the citizen, it is not a general law within the meaning of this section although the subject matter, if applied to any portion of the state other than classified cities and incorporated villages, would be a law of a general nature. Such construction seems necessary in order to give effect to sec. 6, art. 13, of the constitution."

This decision was afterwards approved by the supreme court, 56 Ohio St., 47. But it is probable that said court did not intend to approve of the particular portion of the decision above quoted, for in the same volume, in the case of Gaylord v. Hubbard, 56 Ohio St., 25, the court in an able and comprehensive opinion discusses this provision of our constitution, but does not announce such a rule. However, in our opinion, the principle of the rule is fully recognized and is the very foundation of the judgment of the court in that case. The court say, at page 37:

"It directly concerns every owner of a parcel of land within the state, and indirectly the owner of any other species of property liable to taxation under our system of raising public revenue, and also affects the public revenue itself."

And again, at page 38, the court say:

"That act granted relief to tax-payers who in a county having a city of the first grade of the first class, had erroneously paid taxes under a certain section of the Revised Statutes, while no relief was provided for a tax-payer for taxes paid under similar conditions in the other counties of the state. The act in that case granted relief to persons who had paid taxes in one county which was denied to persons who, under identical circumstances, may have paid them in the other counties of the state. In the case under consideration the statute imposes a burden upon owners of real property situated in cities of the second grade of the first class (Cleveland), not imposed upon the owners of real property situated in other parts of the state. We think section 26 of article 2 of the constitution prohibits this being done."



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The above is the real ground of the opinion, and is based on the fact that it directly affects the individual property owner.

We are of the opinion that the subject matter here under consideration, viz: Alleys, is undoubtedly general, and not local. We think the common understanding of mankind is that alleys are like streets, highways and bridges. They are common to every city, village or hamlet within the state, and have the same general characteristics wherever located, and in this respect are easily distinguished from waterworks, sewers and crematories which differ in every locality, and are therefore proper subjects for local legislation; but the fact that the subject matter is of a general nature does not require that the law shall have a uniform operation throughout the state as to the manner in which the powers of the state shall be exercised in the different portions of the state. One board or agency may perform the duties incident to sovereignty in one city, and another board in another city, and still another board in another city or village perform the same act. The manner in which the corporate powers and duties are performed does not affect directly the rights of the individual property owners. If the subject matter is of a general nature, his right is that his person and his property shall be affected in all material matters in the same way and manner throughout the whole state. This we think is the correct rule.

Therefore we see no reason to hold this law unconstitutional for the reason that alleys of twenty feet or less in width are to be built by a particular board in said city, and alleys of a different width are to be built by another board. This relates to the acts to be performed by the corporation in the exercise of its sovereignty, and if in doing it the citizen is not directly injured, he can not complain.

But does this act directly affect the individual property owner abutting on an alley of twenty foot or less in the city of

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Cincinnati differently from what it does in other portions of the state, or differently from the owner of lands abutting an alley more than twenty feet wide in said city? If so, the subject matter being general, it must be contrary to this provision of the constitution. It will be observed that section seven of this act requires that the entire cost of the improvement excepting two per cent and the intersections shall be assessed on the lots and lands bounding and abutting on the improvement, whereas in the general law, section 2293, Revised Statutes, it is provided:

“If the cost and expenses of improving a street, alley or other public highway have been paid by the abutting property owners and the grade remaining unchanged it becomes necessary to re-pave such street, alley or highway, one half of the costs and expenses of such re-paving shall, if the council deem it just, be placed on the general tax list of all taxable property in the corporation, and collected as other taxes are collected, and applied to such cost and expense of repaving.”

The petition in this case alleges that the alley in question had previous to this improvement been graded, curbed and paved by the authorities of said city at the expense of the abutting property, and that no change of grade had been made.

It seems clear to us, therefore, that the property owner who has once paved his alley, and when there is no change of grade on a twenty foot alley or less, in the city of Cincinnati, has had taken away from him certain rights which are accorded to every other property owner in the state. In said city his property is liable for the whole improvement, whereas in any other portion of the state, the property owner may have to pay only half the cost of the improvement. In the Gaylord-Hubbard case, *supra*, quoting again from said case, the supreme court say:

“In the case under consideration the statute imposes a burden on owners of real property situated in.

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cities of the second grade of the first class (Cleveland) not imposed on owner of real property situated in other parts of the state."

This statement in every particular is exact and applicable here, if we insert cities of the first grade for cities of the second grade of the first class. For this reason, and this reason only, we feel in duty bound to hold this act unconstitutional in so far as it applies to twenty-foot alleys which have previously been improved and where no change of grade is made. We have been forced to this conclusion after a careful consideration of the question, and with a desire to hold the law constitutional if we could, well knowing the great harm that may result to the city if the law should be so held. Without regard to our own opinions on this subject we would feel ourselves in duty bound to hold the law valid by reason of the decision of the general term of the superior court of this city, announced in 4 Nisi Prius Reports, p. 220, wherein said law was held valid, were it not for the fact that the exact question here raised, and considered by us of vital importance, was not then passed upon by that court, and we are informed by the learned and able judge who pronounced the opinion in that case, that it was not argued or presented to that court for consideration, and therefore the decision should not be considered as a binding authority on the question here presented and decided.

The injunction must be granted as prayed for.

*Thomas McDougall, and Pogue & Pogue, for Plaintiff and Others.*

*Kinkead & Kattenhorn, City Solicitors, for City.*

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**The Tol. & Maumee Valley R. R. Co. v. The Tol. Traction Co.**

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(Sixth Circuit—Lucas Co., O., Circuit Court— Sept. Term, 1898.)

Before King, Haynes and Parker, JJ.

**THE TOLEDO & MAUMEE VALLEY RAILROAD COMPANY  
v. THE TOLEDO TRACTION COMPANY.**

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Where a Street R. R. Co. contracts with another Street R. R. Co. whereby it permits the cars of such other company to run over its track, such other company cannot under such contract run the cars of the third company over the tracks of such first company.

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KING, J.

This action is brought to enjoin the defendant from interfering with or obstructing the plaintiff from running certain cars over the tracks of the defendant, the Traction Company, in the city of Toledo. It was commenced in the court of common pleas on July 2, 1898. A trial was had, and from the judgment rendered appeal was taken to this court. The case is submitted here upon exhibits, the evidence offered in the court of common pleas, and some oral testimony taken here.

In November, 1896, the same plaintiff began an action for an injunction against the defendant, alleging substantially the same acts. That case was appealed to this court, and tried and decided here, in October, 1897. The opinion in that case is reported in 15 C. C. R. 190.

The case arises over some disagreement between the parties as to terms, and the construction to be given to the terms, of a contract that had been made between the Traction Company and the plaintiff, allowing it to run its cars and traffic over certain lines belonging to the defendant. The defendant, the Traction Company, owns street railway privileges and tracks and cars in the city of Toledo, and the plaintiff owns similar privileges, tracks and cars on a line running on either side of the Maumee river from the city of Toledo southwesterly to the villages of Maumee and

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Perrysburg respectively, crossing the river at that point. They made a contract in June, 1894, the object of which is set forth in the third paragraph of it in these words:

“The parties hereto desire to make a mutual arrangement and agreement whereby said roads may be connected so that the traffic over the road of second party (the plaintiff in this case) may pass over the roads of first parties, so as to make a continuous circuit or belt line connecting the city of Toledo and the villages of Maumee and Perrysburg, without change of cars or delays of any kind.”

Some time after that a street railroad company, which for short is denominated the Bowling Green Railroad Company, constructed a railroad from the village of Perrysburg to the village of Bowling Green, some few miles further south, which company entered into a contract with the plaintiff, by which it was to have certain rights and the plaintiff was to assume certain obligations, in the way of transporting passengers and traffic and cars of the Bowling Green railroad over its line; but the Bowling Green railroad made no contract with the defendant in this case by which its cars or traffic were to be transported over the defendant's lines of railway in the city of Toledo.

The case tried and decided before this court at the September term, 1897, presented certain facts for the consideration of the court from which it undertook to construe the rights of these parties as related to those facts. I might say here, it was not then, and is not now, a matter that is beyond controversy or free from doubt as to the construction that should be placed upon these contracts or the rights of the respective parties thereunder as affecting this controversy. The facts in that case, as stated in the opinion of this court, were that the plaintiff company through and under this arrangement with the Bowling Green company, at the time of the placing of the obstructions which the suit was brought to enjoin, was running a certain number of its

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own cars over its own tracks, and instead of confining them to its tracks, was running those cars over the tracks of the Bowling Green company, in a continuous line from the city of Toledo through the villages of Maumee and Perrysburgh to Bowling Green and return; and likewise running them over the lines described in their contract upon which it had the right to run within the city of Toledo. We held in that case upon the facts there presented that the plaintiff was entitled to an injunction. Considering the doubtful character, however, of the questions involved, and the fact that we might not be clear how far the parties or the court might go in construing their rights, the court said at that time that the opinion and decision should be confined to the facts that were there presented; that the facts in the case concurred in making the cars and traffic which had been stopped the cars and traffic of the plaintiff railroad, coming fairly within the provisions of the contract, and which the defendants was bound to receive in the manner in which they had been tendered to it. After that decision the parties did not see fit to prosecute that case further.

Following the decision in October, in December or January next, the plaintiff company took off two of its cars that had been running for a year or more, and by agreement with the Bowling Green company arranged that the Bowling Green company should furnish two cars in their place. The Bowling Green company purchased two new cars for that purpose and put them upon the track, perhaps in January, 1898, and commenced running them, and did run them from that time until this suit was commenced in July. About April of that year the plaintiff company took off two more of its cars, and the Bowling Green company, having two cars which it was not using, and which had been stored during this preceding controversy, put those two cars on. So that at the time of the grievances which are complained

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of in this case the Bowling Green company was running four of its cars over its own tracks and road and over the tracks and road of plaintiff, and over the tracks and road of the defendant, and carrying such traffic and passengers as it could pick up along these lines. Thereupon the defendant obstructed those cars, refused to carry them. The defendant claims no right to obstruct any others in this case. This proceeding is to enjoin them from obstructing these cars.

It is unnecessary to review this case or to go over these contracts. We think, upon a consideration of the case as made, that it is essentially different from the other case. It may be that the facts show but little difference, and it is argued here, and urged upon us for consideration, that no more cars are being run over the defendant's road than were being run at the time of the trial of the other case. That of course cannot be a distinctive element; for this contract is to receive a fair construction. The Traction Company agreed that it would carry the cars and traffic of the Maumee Valley Railway Company over the lines described in this contract, and whether it takes three or six cars to carry that traffic, defendant will be bound to do it; and it will hardly do to say that because no more cars are run this year than last, therefore the defendant cannot complain, even if compelled to carry the cars and the traffic of other railroad companies. If we were to make that the rule to determine the defendant's liability here, then it would be true that if the Maumee Valley Railroad Company, by reason of the building up of the country above the city, should require instead of three or four cars, or whatever number it has been heretofore running, eight cars, it could not run those cars under this contract. That construction the plaintiff would not agree to, for it is clear, under that contract, it would not be proper. It is clear that the

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defendant is bound to carry the cars and traffic of plaintiff.

That case was decided upon the ground solely that the traffic and cars which it was running were properly and fairly, under the terms of the contract, the traffic and cars which the Traction Company was bound to receive and carry; but we do think it makes a vast difference when the claim is made that the Maumee Valley Company may take the cars of any other railroad company that it comes in connection with, and run those cars over its track and over the track of the defendant companies, under this contract. Somewhere it seems evident that the line must be drawn, and we may as well draw it at this point as at any other. This may not seem a very large matter in and of itself, but the parties have invoked the jurisdiction of the court to determine this question, and we hold and decide that in this case, where it is shown that the cars which it is proposed to run are not the cars of the plaintiff company at all, but are the cars of another railroad company, running from off another railroad company's tracks upon its tracks before reaching defendants' lines, that the defendants are not bound to receive them, and that therefore they would be justified in stopping them before they come upon their tracks, or at the point where their tracks connected.

It is evident that questions of this kind are about to become very important, as other lines of railway in the near future will undoubtedly be constructed, either connecting with some of the roads involved in this controversy, or coming to the city of Toledo independently of them; and if those companies desire to run their traffic into the city of Toledo, it would seem that they will have to make arrangements with the defendant if they desire to use its tracks, or else secure a right over them in some other legal way, or an entrance along other streets of the city. We feel fully justified in saying that the plaintiff has not



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proved here an equitable case for injunction, and therefore the petition will be dismissed.

*King & Tracy*, for Plaintiff.

*Barton Smith*, for defendants.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Nov. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

JENNIE C. MOORE v. SEBASTIAN FEIG et al.

JENNIE C. MOORE v. FREDERICKA MUELLER et al.

JENNIE C. MOORE v. CHRISTIAN SCHULTZ et al.

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*Construction of will—"Heir" used for "issue"—Vesting of fee simple estate depending on birth of issue—*

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Error to the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

There are three cases brought here by Jennie C. Moore, each upon a petition in error to the court of common pleas. There are different defendants in each case, but each rests upon the same facts and propositions of law. In each case the petition is an ordinary petition in ejectment. The defendants in each are in possession of and claim to own certain lands. The plaintiff claims ownership of the same lands.

The plaintiff is the only child ever born to John Kneale, Junior. John Kneale, Jr., is now dead. He was the son of John Kneale, Sr., who died in December, 1860, leaving a last will and testament which was duly admitted to probate. At the time of the execution of his will John Kneale, Jr., was unmarried. The will is in the following words:

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"In the name of God, amen. I, John Kneale, being weak in body but strong in mind and memory, do make and declare this my last will and testament.

"I. I will my body to dust and my soul to God.

"II. I give and bequeath to my son John Kneale all my personal property, and also all my real estate, or the use thereof as hereinafter pointed out, subject however to the life interest of my wife Eleanor, and the payment of all my just debts.

"As a condition of the above bequest, my son John is hereby required to pay to my other sons Thomas and James, within one year from my decease, each the sum of one thousand dollars. A further condition is that said John shall pay to the children of my two deceased daughters Ann and Betsy each the sum of fifty dollars, to be paid to them as they severally arrive at majority.

"Said John is further required to pay to Jane, daughter of my brother Daniel Kneale, of the Isle of Man, the sum of fifty dollars on demand, in case she, the said Jane, should be living.

"Said John is further required to pay within four years from my decease the sum of twenty dollars for the support of foreign missions, to be paid to the preacher in charge on the Newburgh Circuit.

"Now, if my said son John shall have an heir of his own body, then all title and interest in and to my real estate with power to convey, and sell shall vest in him. But if said John should die leaving no heir of his own body, then said estate shall pass to my son Thomas, subject to the same requirements, restrictions and limitations pertaining to John. And in case Thomas should die and leave no heir of his own body, then it is my will that my said real estate pass absolutely to my son James and his heirs forever, with power to sell and convey. But in no case shall John or Thomas sell or dispose of said estate, unless they shall have an heir of their own bodies.

"Lastly I give and bequeath to my wife Eleanor Kneale in addition to her life interest in my estate the exclusive use of the two North rooms in my dwelling house, one bed-room in the chamber, and a proportionate use of the cellar and well.

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“In witness whereof I hereunto set my hand at Warrensville, in the county of Cuyahoga and state of Ohio, this 10th day of September, A. D. 1855.

“Signed and declared by the above named John Kneale to be his last will and testament in presence of us, who at his request have signed as witnesses to the same.

John Kneale.

“Truman G. Kent.

“Luther R. Prentiss.”

The result of the trials of these several cases in the court of common pleas was a judgment in each case for the defendants. To determine whether or not these several judgments are right, necessitates a construction of this will, because the plaintiff, having outlived her father and being the only child ever born to him as already stated, if the construction claimed by the plaintiff is correct, the judgment in each case should have been in her favor; while if the construction be given to the will which is insisted upon by the defendants, the judgments are right.

The defendants in each case are in possession of certain real estate which was owned by John Kneale, Sr., at the time of his death, and they claim ownership by conveyance made to them directly or through intermediate conveyances from John Kneale, Jr. Each conveyance under which the defendants claim, was made after the birth of the plaintiff.

It is said on the part of the plaintiff, that John Kneale, Jr., took only a life estate in the real estate left by his father; and this is claimed, first, because of the language of the second item of the will, the first clause of which reads:

“I give and bequeath to my son John Kneale all my personal property, and also all my real estate or the use thereof as hereinafter pointed out, subject, however, to the life interest of my wife Eleanor and the payment of all my just debts.”

On behalf of the plaintiff it is urged that the words “or

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the use thereof as hereinafter pointed out," are equivalent to the words "or rather the use thereof as hereinafter pointed out."

We think, taking into consideration the entire will, that it is a no more unwarranted construction of these words than that claimed by the plaintiff, to say they are equivalent to "or else the use thereof as hereinafter pointed out."

A further claim in this Item (Item 2) reads: "Now if my said son John shall have an heir of his own body, then all title and interest in and to my real estate with power to sell and convey shall vest in him."

On the part of the plaintiff it is urged that these words are equivalent to: "Now if my said son John shall have an heir of his own body, then all title and interest in and to my real estate with power to sell and convey shall vest in such heir; while on the part of the defendants it is said that the words are equivalent to: "Now if my said son John shall have an heir of his own body, then all title and interest in and to my real estate with power to sell and convey shall vest in said John." If the word "heir", as used in this clause, is used in its technical sense of "one who inherits from another," the plaintiff's construction would seem reasonable; but we all know that this word "heir" is often used in common parlance as meaning "child". It is very common to say that one has an "heir" born to him, meaning only that a child has been born to him.

The language of this will, as a whole, evidences that the draftsman was not an educated man likely to discriminate carefully as to the meaning of words, and may, if such becomes necessary for a true construction of this will, be fairly presumed to have used this word "heir" in its more common signification, and to have meant by the words "heir of his own body", "issue of his own body". If this be the true construction, then, upon the birth of issue of his body, John became the owner in fee of this property, or else he

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ceased to have any estate in it whatever, because, upon the birth of the heir, "all title and interest in and to my real estate with power to sell and convey shall vest in him," and if "him" means "issue of his own body", then the child at birth became the owner of this property absolutely, and might, upon arriving at full age, convey the same without any interference on the part of the father, and, indeed, it might be sold, under proper proceedings, by the guardian of such child, during the child's infancy, and John would have had no right to interfere.

If, however, the antecedent of the word "him" be John, then upon the birth of the child, John might convey, as he did, and the title made by him would be perfect.

This latter construction is, as we think, strengthened by other parts of the will. John is required to pay, as will be seen by the reading of the will, a considerable sum of money to other persons as a condition upon which he shall hold whatever estate is granted to him in the will. One of the provisions of the will is in these words: "But if said John should die leaving no heir of his own body, then said estate shall pass to my son Thomas subject to the same requirements, restrictions and limitations, pertaining to John." Here it will be observed that the words "leaving no heir of his own body" are used, while in the clause before quoted the words are "Have an heir of his own body," and it is urged on the part of the plaintiff, that if the construction claimed by the defendants be given to the will, a state of facts might have arisen which would make this last-quoted clause entirely nugatory, because John might have issue of his own body born, and still die leaving no issue. And it is said if this state of facts had existed at the time of John's death, and John had before that time, after the birth of his child, conveyed the property away, Thomas

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would have been left without any interest in the estate, whereas the testator has expressly given to him this property in the event that John should die leaving no "heir of his body." It is manifest that this difficulty exists, if the construction claimed by the defendant be given to this will. But we are inclined to the opinion that less difficulty results from giving the construction to the will, claimed by the defendants, than in giving it the construction claimed by the plaintiff.

We are strengthened in this view, by the following clause in the will: "But in no case shall John or Thomas sell or dispose of said estate unless they shall have an heir of their own bodies." Clearly the words "heir of their own bodies", are used in the sense of "issue of their own bodies," because if the word "heir" is used in its technical sense, neither John nor Thomas could have sold at all, for neither could leave an heir of his own body until after his death.

On behalf of the plaintiff it is urged that the word "estate" is used in its technical sense of "interest", but, even if that be true, the difficulty just suggested, would still exist. Such interest could not be sold until the parent had died leaving an "heir", as he could have no "heir" in the technical sense, until death. But the word "estate" in common parlance is used to mean "property", and we think was so used in this clause of the will. So that the provision is that neither John nor Thomas should sell this property unless the one, so undertaking to sell, should have issue of his body, and, in the event of his having issue of his body, we think the implication is plain and should be considered in determining the true construction to be given to this will.

It is manifest that the testator supposed that but for this provision, some disposition of the property might be made by John or Thomas, and he undertook to say that such dis-

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position should not be made except upon the happening of a certain contingency, and it seems fair to say that upon the happening of such contingency he intended that the property might be sold.

It is not without some misgivings that we come to the conclusions to which we do in these cases, because whatever construction be given to the will, as already pointed out, might result in difficulties which we think were not foreseen by the testator. But, on the whole, we are of the opinion and hold that the construction to be given to the will is that contended for by the defendants, that the judgment of the court of common pleas in each case was right, and such judgments are affirmed.

*Wm. Howell, and George L. Phillips, for Plaintiff in Error.*

*Hessenmueller & Bemis, for Defendants in Error.*

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before King, Haynes and Parker, JJ.

THOMAS H. DEVEAUX v. WILLIAM E. CLEMENS.

*Evidence—Testimony at former trial—Witness not accessible stenographer's notes competent.*

- (1). Sec. 5242a, as amended, providing that whenever a witness, after testifying orally, die or is beyond the jurisdiction of the court and his testimony can not be obtained in any manner, the stenographer's minutes of the testimony taken at a preceding trial shall be admissible in evidence is not in violation of the constitutional provision that one charged with crime should meet the witnesses face to face.

*Refusing colored person accommodation—Action for penalty.*

- (2). In a suit by a colored person for the penalty for a violation of sec. 4426-2, R. S., providing that all persons shall be entitled to the full and equal enjoyment of the accommodations of inns, restaurants, etc., a preponderance of the evidence is sufficient to authorize the plaintiff to recover. Such a suit is a civil action.

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*Leading questions—Discretion of court.*

- (3). The permission to ask leading questions is to some extent within the discretion of the court, and a judgment will not be reversed unless an abuse of such discretion is shown.
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Error to the Court of Common Pleas of Lucas county.

KING, J.

Clemens brought suit against DeVeaux before a justice of the peace to recover a penalty provided for by section 4426-2, Revised Statutes. The preceding section provides in substance that all persons in this state "shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses, "etc.," subject only to the conditions and limitations established by law applicable alike to all citizens." And this section 2 provides that any person who violates the first section "by denying to any citizen, except for reasons applicable alike to all citizens of every race and color \* \* the full enjoyment of any of these accommodations and privileges \* \* or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum not less than \$50 nor more than \$500 to the person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where said offense was committed." It further provides that he may be prosecuted and convicted of a misdemeanor, and fined these sums or imprisoned a period of time; and provided further that a prosecution and judgment in either form of action will be a bar to the other. This suit was brought to recover the penalty provided in that respect. It resulted on appeal to the court of common pleas in a verdict for the plaintiff below for the sum of \$50. It is claimed that error intervened in that case in two or three particulars.

On the trial, the testimony of a witness who had appeared and testified at the former trial, but who, on this trial, was not present, was taken and used through the notes of the



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stenographer. It is urged as objection to this, first, that there was no proper or sufficient showing that authorized, under the statute, the admission of this testimony; and second, that the nature and form of this action was criminal, and that the defendant was entitled to meet the witnesses against him face to face, under the provision of the bill of rights of the Ohio state constitution. The statute is sec. 5242a, as recently amended, and provides that whenever a witness after testifying orally, die, or is beyond the jurisdiction of the court, and that the testimony so used cannot be obtained in any manner, that the stenographer's minutes of the testimony taken at the preceding trial are admissible in evidence. There was appended to the minutes or the notes of the stenographer an affidavit which recited that this witness was beyond the jurisdiction of the court. As the affidavit was filed under the statute, it must be held to have been sufficient to authorize the court of common pleas to admit the testimony, and to hold that the testimony under those circumstances would be competent. This section, except for the innovation it contains as regards stenographers' notes and minutes of the testimony of witnesses taken on a former trial, is nothing new in the practice of the law. It is an old and well settled principle of law that the testimony of a witness given at a former trial between the parties, and upon the same subject matter, in the absence of that witness beyond the jurisdiction of the court, or his death, may be offered in evidence. Under the laws of Ohio he could have his deposition taken, of course. A deposition is one form of introducing that testimony in evidence. But it is claimed to the court here that the defendant was entitled to meet his witnesses face to face, even if he were present. That would, I think, be answered by the reasoning of the court in the case of *Summons v. State*, 5 Ohio St., 325 and 340. That was a criminal case, where the defendant was prosecuted by an indictment for the crime

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of murder, and there the testimony of a witness was offered that had been used in the same case at a former trial. Of course, in those days they had to prove it largely by the testimony of witnesses who heard the witness testify. The court say that does not violate the provision of the constitution that one who is charged with crime should meet his witnesses face to face. It is admittedly one of the exceptions to the principle as to the admissibility of evidence, and arises from the necessities of the case: the inability to procure the evidence of the witness by any other means. That case would answer the charge that the defendant here was entitled to meet the witness face to face, and I need not say anything more about it.

It is contended further that the court charged the jury that a preponderance of evidence was sufficient to authorize the plaintiff to recover. It is strenuously urged that this is a charge of a crime, or that which might constitute a crime; for the statute creating the offense provides that it may be prosecuted either in the criminal or civil courts; and that the charge would be the same in one event as in the other. It has been held in many cases by the supreme court of Ohio that in actions to recover damages based on offenses that otherwise would be criminal, a preponderance of evidence is sufficient to authorize the plaintiff to recover. A number of those cases can be found: 26 Ohio St., 2; 34 Ohio St., 157; 34 Ohio St., 151; 40 Ohio St., 204. It has been held among these that prosecutions to recover damages for the illegal sale of intoxicating liquors, prosecutions to recover damages for the unlawful and malicious destruction of property, are alike governed by the same rules of evidence that apply in other civil cases. It is also well settled that in prosecutions in bastardy and in cases of a like nature, a preponderance is sufficient, although in those cases the form of the verdict is simply "guilty", and the amount of the penalty is fixed by the court, and not by

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the jury. In this case the amount of the penalty is fixed by the jury within the limits of the statute, and not by the court. We are unable to find any authority which would sustain us in holding that the plaintiff should be required to prove his case beyond a reasonable doubt, in a case like this, to authorize a verdict in his favor.

In the course of the trial there were some questions asked which it is claimed were leading. To some extent the permission to ask leading questions is within the discretion of the court. A case will not be reversed on that ground unless an abuse of that discretion is shown, and especially where the record shows that the questions and answers were not in anywise prejudicial to the defendant. We do not think these were prejudicial in this case, and an examination of the record does not disclose any error for which the judgment should be reversed. It will therefore be affirmed.

*Southard & Southard*, for Plaintiff in Error.

*E. O. King*, for Defendant in Error.

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(First Circuit—Hamilton Co., O., Circuit Court—July Term, 1898.)

Before Cox, Smith and Swing, JJ.

PERCY D. IRELAND v. H. T. LOOMIS, Administrator of  
Alice S. Ireland.

*An equitable action will not lie in Ohio for the recovery of personal property—*

Error to the Court of Common Pleas of Hamilton county.  
SWING, J.

We think the judgment of the court of common pleas should be reversed, for the reason that the petition of the plaintiff in that court does not state facts sufficient to constitute a cause of action, and plaintiff's petition should have

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been dismissed. The action of the plaintiff was a suit in equity to recover the possession of certain personal property other than heirlooms or written evidences upon which a suit at law might have been brought. We have no such action in Ohio, although it is alleged that the defendant conceals the property, and is insolvent. The authority cited from Massachusetts is not in point, as in that case the court holds in favor of the action by reason of the terms of their statute. We have no such statute in Ohio.

Plaintiff's action should have been under section 6053 et seq., and under the provisions of the statute in aid of execution. There is no statute in our state which authorizes an equitable action for the recovery of personal property, and without which there is no such right except as above referred to.

The judgment should be reversed and the cause remanded to the court of common pleas with instructions to dismiss plaintiff's petition.

*Hagans & Hagans*, for the Plaintiff in Error.

*Cleveland & Bowler*, for the Administrator.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1894.)

Before Bentley, Haynes and Scribner, JJ

MELOHIO J. SCHAAL v. EDWARD W. HECK.

*Examination of witnesses—Interruption with questions by adverse party—Discretion of court.*

- (1). Counsel has no right to interfere by questions, etc., with the examination of witnesses by adverse counsel, but should wait until his turn comes to examine the witness; yet this is a matter in the discretion of the court, and where it does not appear to have been prejudicial to the party, it will not be sufficient ground for a reversal of the judgment.

*Res Gesta—Expressions of party after occurrence—Admission for erroneous reason, when not ground for reversal of judgment.*

- (2). An expression by one of the parties after the occurrence, being

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one of surprise, is not admissible as part of the *res gesta*. If however the expression was otherwise admissible under the state of the pleadings in the case, the fact that it was admitted for an erroneous reason would not warrant a reversal of the judgment.

*Expert testimony—When not proper.*

- (3). Where the danger was so plain and obvious that any ordinary workman could notice it, expert testimony should not be admitted.

*Employer and Employee—Liability for defects in appliances.*

- (4). The employer is not a guarantor of the sufficiency of all the appliances furnished the workman for use, but he must use ordinary and reasonable care in providing safe appliances.

*Same.*

- (5). A workman takes his chances in working in a dangerous place or situation regarding which he knows the facts, yet he is not chargeable with the risk to the same extent as is the master. He is not under the same obligation to search for hidden defects or possible dangers as is the master.

*Injury to apprentice.—Contributory negligence.*

- (6). Where the workman injured was an apprentice, yet if he had ordinary intelligence, he was bound to apply it, and if by the exercise of ordinary care he could have known the conditions he was working under, he is presumed to know them, and the law charges him with such knowledge.

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BENTLEY, J.

I shall not attempt to go over in detail and consider all of the many exceptions that were taken during the trial of this case. The record is quite long, and the exceptions are various. I will dispose of all the objections and exceptions in groups, without specially turning to each particular one.

In order to do this with any fair degree of brevity, it will be necessary to have before us the main outlines of the matters involved in the case, and I will state them from memory, as they were presented by the pleadings and the record, but perhaps not with entire accuracy.

Nearly four years prior to February 15, 1893, the plaintiff below, Edward W. Heck, a young man, was apprenticed to the defendant below, the plaintiff in error here, Melchoir

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J. Schaal, to learn the trade of a brick mason. It seems that the terms of apprenticeship were fixed in some way by some labor union, and the precise terms of the contract do not appear anywhere in the record; but Mr. Schaal accepted Mr. Heck as his apprentice in the business, and Mr. Heck entered the employment. Mr. Schaal was a building contractor, and had built quite a large number of important buildings in the city of Toledo, and, I believe, was himself a practical brick mason, with some years of experience. A few weeks or so prior to February 15, 1893, Mr. Schaal took the contract of the Toledo Electric Company to build for them a large brick structure as a power house on Water street, in this city, a couple of blocks north of Cherry street. During all of the time intervening between the beginning of this apprenticeship of Mr. Heck and the building of this structure in question, Mr. Heck had worked with the other workmen of Mr. Schaal about brick laying, and laid up or assisted in laying up walls such as are ordinarily used in buildings around the city. This building had progressed to some extent by February 15, 1893, and there was then to do about it the finishing of a wall—perhaps it might be termed the end wall—fronting on Water street. It was to be a solid brick wall, twelve inches in thickness, from the ground up to a certain cornice which I will mention hereafter. At this time this wall had been started, and had been worked upon the day before February 15, and brought up to a certain height, and, as was usual, and customary, and proper in the building of a twelve inch wall, at about every seventh course of brick, the three courses constituting the wall were tied together by a tying course, or “headers” as some of the witnesses call them. No complaint is made but that the wall was properly made, so far as it stood on February 15, the day in question. At that time it had been brought up above the second story. In laying the wall it was customary, and, it seems by the evi-

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dence, entirely proper, to lay the outside course the width of a brick, viz.: four inches, up a certain distance first, then the middle course also of four inches, next to that, and the tie put in at each seventh course; and when the outside and middle wall were thus put seven courses high, the inside four inch wall was also brought up and tied to the middle wall. So that when these ties were in, it constituted a wall twelve inches in thickness, consisting of three separate layers of brick, but tied together firmly in the manner that I have stated, being laid up with ordinary mortar.

On the day in question the plaintiff below, Mr. Heck, and four others, bricklayers, were at work upon this wall to carry it up further. It was to be built in all upwards of forty feet, perhaps forty-five. They proceeded to lay the wall, using a scaffold which had been prepared, resting upon boards laid across the floor joists, until they had raised the entire wall some two and a half or three feet above the top of this scaffold. Then, without making any other scaffold, or raising this one, they proceeded to lay the wall up some farther. They laid the outside wall up to a certain distance, perhaps making about forty feet in length in all, until they reached a certain place where there was a projection of brick to be put in, the brick projecting outwardly from the wall beyond its general surface. I will speak of that projection more particularly soon. Then the middle wall was built up to that place, or to about that place, and tied. But the inner wall, it is claimed by the plaintiff, was not brought up to that point. Upon the part of the defendant below we understand that the claim is that the inner wall itself was brought to about that point, so that up to that point there was in fact a twelve inch wall built in the ordinary way, that had been laid below, and properly tied together. But the claim of the plaintiff is that up to that point where the projection started there was but the outside and middle tier of brick, laid so that it made a wall, when

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the projection was reached, of only eight inches in thickness. At that height of wall this projection started. It was built in such a way that the first tier of brick which was to construct the projection projected an inch beyond the outside surface of the wall, and the next course about that projected still another inch beyond that course, and another one projected still an inch farther, and the fourth course projected an inch still farther; so that the effect was in all to make a projection four inches in thickness, extending that far out beyond the general surface of the wall below. It is claimed by the plaintiff that this wall, after it had reached the place where this projection came in, was carried up in that way, viz: without extending and carrying up with it the inner inch tier of brick, but only the outside and middle tier and those tiers which constituted the projection; that that was carried up quite a distance—several feet—and then on top of that the projection of four inches was continued, together with another four inch tier of brick next inside of that, which last four inch tier was directly above and might be said to be a continuation of the original outside tier of the brick wall. It is claimed by the plaintiff that this manner of doing the work was known to the defendant, who was there some of the time, perhaps, and it was also known to Melchior Schaal, Jr., or at least to young Melchior Schaal, a nephew of the defendant, who was the foreman of the defendant in charge of these men in the absence of the defendant himself; that in fact he, the nephew, did part of this work himself, and at least laid what was called the "trigs" on top of the wall. The wall in the center of the building was to be carried up some fourteen inches above the level of the corners of the building, making a sort of a flat gable at that end to receive the roof. Plaintiff claims that the foreman laid this trig, as it was called, in the center upon the top of this wall, carrying up these two courses upon the outside to the final height of



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the wall at that point, but leaving the inmost tier of the brick wall, as I have stated, away down below. And it appears by the testimony that in this laying of the trig, so-called, the plaintiff Heck assisted—that is, he, standing on the studding or platform below, handed up the brick and the mortar to the foreman, who then climbed down from that place and directed the plaintiff to bring up those parts of the wall that had not been brought up to their full height; a line being stretched from the top of this trig down to the corners of the building, thus affording a gauge to determine the height of the wall at all places, along a gradual and uniform slope which was to be from the top of the trig to the corner of the building. The plaintiff claims that just after he had begun to comply with the orders of the foreman to lay up the brick upon the outside wall below the trig—about two minutes after he began that work, and two or three minutes after the foreman got down from the place, the wall fell—that is, the portion of the wall about where he was standing fell—outwardly, when he was necessarily standing upon a portion of the incompleated part of it, and he being unable to grasp anything, or to save himself, was precipitated with the portion of wall that thus fell, landing upon the bricks that had fallen down just ahead of him, and that in so falling he received a very serious injury to his foot and other portions of the body, and was permanently injured.

He charges that this contractor, the defendant below, was guilty of negligence in two or three particulars, viz: in not providing or seeing that there was provided, a staging built and kept up so high, as the wall progressed, that the workmen could stand upon it, and not be required to stand upon any portion of the wall while laying it up. Plaintiff below claims that if the defendant below had done this, he, the plaintiff below, would have been standing upon a scaffold, and if the wall had fallen, he would not have gone with it,

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and perhaps the wall itself would not have fallen if the work had been done from the staging. Plaintiff below also claims that the foreman was negligent in requiring him to lay up the outside course of this wall above this projection, without seeing to it that the wall below had been completed to its full thickness, and the inside course brought up and properly tied. He claims that if that had been done, the projection would thus have been tied to the main wall, and would have been supported by it, so that it would have been in no danger of falling.

The claim of defendant below is that the wall was built in accordance with the usual way of building such walls; that he had no notice or knowledge that there was any danger about it, and that he was not chargeable with any such notice or knowledge; that it was usual to build such walls without using a scaffold at the very top and by standing upon portions of the wall; that he had no facts from which he ought to be charged with notice or knowledge that he was putting his workmen in any danger; and he also claims that whatever danger there was, the plaintiff below had as much knowledge of, and was chargeable with as great a knowledge of, as was he himself, and if the plaintiff worked in a place of danger, he was chargeable with contributory negligence, if by reason of his working there he suffered this injury.

This presents the main controversies in the case as they were presented to the jury, except that I might state that the answer of the defendant below, while admitting that this man had been working for him as his apprentice, yet in the form of a general denial, denied that this wall fell in this manner, or at all, or that the plaintiff was injured, or that the defendant below himself was guilty of any negligence.

The trial of the case was conducted, as it would seem from this record, with a great deal of vigor and consider-

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able vehemence, upon both sides. It was a hard and tenaciously fought case. Our late lamented brother Ford appeared in the trial of the plaintiff below, and Judge Doyle for the defendant, Mr. Scott being there a portion of the time assisting in the defense.

There are throughout the record quite a number of exceptions that are claimed to several errors of the court. They are, in part such as these: When the attorney for the defendant was cross-examining several of the witnesses for the plaintiff, and had got to a certain place in his examination, counsel for the plaintiff interfered and assumed the right himself to ask the witness certain questions. In one case, as I remember, the witness had made a certain answer, upon cross-examination, and counsel for the plaintiff said: "What do you mean by that?" And there was an objection, and he said, "I don't understand what the witness means." Thereupon an altercation transpired between counsel in the nature of questions and answers, and replies, and finally the court seemed to allow counsel for the plaintiff to have his question answered. In several instances things of that nature occurred. We think the record shows that the action of counsel for plaintiff was irregular. It would have been proper enough for the court to have stopped proceedings of that kind, and to have compelled counsel to await the time when he could take the witness for re-examination, and straighten up any of these matters; but at the same time, all the cases of that kind that are pointed out in the record, we think come fairly within the rule which regulates the discretion of the trial court, and that in its rulings upon that matter it was simply exercising the discretion which it had in the conduct of the trial, and that error cannot be predicated upon any action occurring at that time.

Counsel for plaintiff in error have argued another matter involving the court's discretion also. Certain objections

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were made and exceptions taken for the reason that the plaintiff below was allowed to bring witnesses in rebuttal to testify to certain matters that were claimed to be properly matters in chief concerning which plaintiff had examined certain witnesses, and perhaps in some cases the witness had been examined upon the same question in chief that was now propounded to him in rebuttal. The court, however, permitted that, and said in so many words that it regarded it as coming within the discretion which was allowed. While to have ruled the other way would have been perfectly proper, yet we cannot say that this was an abuse of discretion, or that it seemed to have resulted in any substantial prejudice to defendant below.

Quite a large number of exceptions are thus grouped and disposed of. There is, however, a serious matter presented which does not come under this head. The plaintiff below testified that immediately after he had fallen, he noticed that defendant himself was standing in a doorway near by, in view of him, and that the defendant, noticing him, began to curse and damn him, and instead of coming to help him, ran the other way, and went up to the top of the building; and it was some time after that, when he had been removed, that the defendant first came to him and made any inquiry regarding the hurt. Against the objections of counsel for the defendant below, the witness was allowed to answer the direct question, as to what, under circumstances of that kind, the defendant below did say to him, and exception was taken. The answer was, as I remember it, "How did that God damned fool fall down there?" or words to that effect. A motion was made to rule this answer out, and the exception was fully preserved, and the question now presented is whether that was testimony that, under the circumstances of the case as they were then presented, was competent. It is claimed that it was after the accident; that the defendant, if liable at all, had

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already become liable by reason of facts that had then fully transpired; that this was a statement afterwards made, and its introduction was designed to prejudice the jury against him, as indicating that he treated the injury of the plaintiff brutally, and did not do what in fairness he ought to have done for him. On the other hand, it is argued by counsel that this was a part of the *res gesta*; that it was so soon after the transaction had taken place that it was a part of the transaction itself. And the court seemed to have admitted it under that view of the matter. Counsel for plaintiff below urged then, as the counsel now urges, that this contained an admission of the defendant of the mental capacity of the plaintiff; that he characterized him as a fool, admitting, therefore, that the plaintiff was not of fair mental capacity; and having done so, the jury had a right to consider that as indicating that the plaintiff was unlearned, ignorant, and not of ordinary capacity, and therefore that his action in standing upon the wall and in doing as he did, must be judged in the light of what he knew rather than what he didn't know. If this was a part of the *res gesta*, an expression made at the time regarding the cause of the accident, if made by the plaintiff below instead of the defendant, would also have been admissible. Suppose the plaintiff had cried out there, perhaps in answer to this question, that the wall had fallen, and that it had not been properly built, and that by reason of the negligence of defendant, or his foreman, the wall had fallen, he had tumbled out with it, and was injured. If this other statement was strictly a part of the *res gesta*, any other expression would be a part of the same transaction, if made by him. But I have in mind a case which would indicate that such an expression would not be a part of the *res gesta*, if made by the plaintiff below—a case decided by the supreme court, where a person had been knocked over into a ditch by the side of the railway track by the car or engine, of the railway

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company. Some person immediately came to him, and while he was helping him out of the ditch, where he had been thrown, the injured person made an expression as to the cause of his being there, and how he happened to be there, and whether he had been knocked there by the engine, or something of that kind; but the supreme court held that that was simply a narration of a past occurrence and was not a part of the action itself, and was not admissible. Without discussing this matter at length, we think this expression on the part of Mr. Schaal cannot be admissible as a part of the *res gesta*—of the transaction itself, by which the plaintiff below was injured. We think it is rather too fanciful a claim to say that it might be an admission that the man was in fact under-witted, or was a fool. It was an expression, evidently, of surprise, and perhaps of anger, and if admissible, would hardly come under that head. The court admitted it, and we are to say whether, under any view of the case, it could have been properly receivable. If it was, although received for an erroneous reason, we will not be warranted in setting aside the judgment.

That question must be viewed in the light of the issues presented by the pleadings. The defendant below in his answer had not admitted that the plaintiff was injured at all, but denied it; and had not admitted that the wall fell at all, but denied it; or that the plaintiff fell; and those were matters to be proven upon the trial by the testimony in behalf of the plaintiff below. Did this expression in any way tend to support those issues? That the wall had fallen, that the plaintiff had fallen with it, or had fallen at all, or had been injured? Now it seems at this time, if this testimony is true, that the defendant below was close by where he could observe the fact that something had happened. He looked at the place, and his attention was called to the fact that the plaintiff was there under certain conditions, and it seemed to be called to his attention, and then

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recognized, as his statement indicates, that not only was he there, but that he had fallen there. And then the proceeded to run to the top of the wall, immediately after observing that. It may not be, as the case went to the jury, that it appeared to them as if there was any real contention or real claim upon the part of defendant below that there was no such thing as the wall falling, or that there was no such thing as that the plaintiff below had fallen; yet the issues presented that, and the plaintiff below was entitled to any evidence that would tend fairly to support those issues, so far as they are material. Some of these at least, were material, and we think that we can see in that testimony what fairly tends to support the contention of the plaintiff below as against the absolute denials of defendant below.

The greater number of the other exceptions relate to objections regarding the form of the questions put to expert witnesses. It is claimed that the experts who were examined on behalf of the plaintiff below were not examined correctly; that questions were put to them in a form that was not admissible under the rules of evidence. It was claimed, for instance, in examining experts as to this wall being dangerous, or being laid up properly, that the order should have been to ask the question how such a wall as that should have been laid upon the ordinary way of laying up walls by workmen; and what was the ordinary and proper way to build a wall; and when the expert witness had answered that question, and had stated the proper and usual way to lay up a wall, then the jury were fully put in possession of the necessary facts to determine whether or not this wall as it was built, as related by the witnesses, complied with that usual, and ordinary and proper way; but that on the contrary, counsel for the plaintiff below asked of the expert witnesses when he had exhibited what he claimed to be a plat or a picture upon paper, showing how the wall was in fact built, whether or not a wall in that way was built ac-

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according to the usual and ordinary way or not, and if not, in what way it differed. That was substantially the way the questions were put, as a general thing. As to the mere form of the questions, while we think that the contention of counsel for the plaintiff in error is correct as to the proper method of making such proof ordinarily, yet we are unable to say that a departure from this ordinary and better form was really erroneous, or that the ruling of the court made in this particular in various places throughout the record may not be well regarded as coming fairly within those cases where the court has a discretion; and unless it resulted in some prejudice fairly appearing upon the record, it ought not to defeat the verdict or the judgment. And we think this may be said as to all such objections. They were, in general somewhat irregular, yet they were not calculated to mislead the jury, and the evidence which went in under them did not present the case unfairly for the consideration of the jury.

The real essence of the trouble in this case, and which underlies the consideration of a great many objections that were made in the course of the trial and to the charge of the court or its action upon requirements to charge, is this; whether in view of all the circumstances confessed in the case by the plaintiff below, he in fact has any case; whether in the laying up of such a wall as that, he being fully advised of the actual facts, was not in as good a position to judge as was the defendant below? He knew, for instance, that there was no scaffold. He knew that there was to be no scaffold. He knew that the wall had been laid up in the first place to the projection, or to the place where this projection was to be, as I have already said. He knew that the inner course was left down for several feet, and that the middle course was not carried up into quite a distance as far as the outside course, after this projection had been reached. All these particular facts were right before the eyes of the



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plaintiff, and he knew them as thoroughly as the defendant did or could be held to know them. But he testifies that he did not know in fact that the wall was liable to fall, and did not know the danger. The other witnesses, masons of long experience, who worked with him, and who were working upon the same wall, liable to the same danger, also say that they didn't have any idea of there being any danger there, didn't realize that there was any danger; and it would seem fairly, from the testimony, too, that neither the defendant nor his foreman knew, in that sense, of any danger from conducting the business in the way in which it was conducted. The question after all, in the case, is whether, under the circumstances, the master, through his foreman, was charged with any greater duty to know of the danger than was the workman himself. If he was, it was because he was in duty bound to take greater precautions beforehand than was the workman; it was because there was a danger that really existed there, and must exist there, or would naturally exist there, of carrying on the business in that way, which was not so obvious, so open, and so patent, that any workman could well see it. If the danger was so open and visible that the ordinary brick mason working there should notice it, or would notice it, or should be held obligated to notice it, it does not present a case for expert testimony at all.

In the case of *Railroad Co. v. Schultz*, 43 Ohio St., 270, the court, after reviewing the authorities in this particular, state the general proposition deducible from them; and while reading only a very small portion, I call attention to what is said on page 282 in the sixth paragraph, although all of those paragraphs ought really to be read and considered in connection with this:

"6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinion from these facts, unaided by the mere opinions of the witnesses."

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If these facts present all that was to be presented, then it was not a case for expert testimony, and the facts being known to the plaintiff below, there was no chance for his making a case, or any reason for his recovery at all. And the seventh paragraph also may be read in this connection, upon the next page—283.

A consideration of this would naturally bring an allusion to what has been held by courts generally in this particular as to what matters the injured party is chargeable with knowledge of. The duty of the master in providing safe appliances and machinery, etc., has been discussed by our supreme court quite a number of times, beginning with a case in 3 Ohio St., followed by a case in 4 Ohio St., and by a case in 5 Ohio St., and also by the case of Railroad Co. v. Webb, 12 Ohio St., 475, the opinion of which begins on page 486, and reviews at considerable length the authorities on this question, and finally states the rule that is settled in Ohio upon this question; the rule being that the master is not a guarantor of the sufficiency of all of the appliances which he shall get for the workman to use, but that in this particular he must use ordinary and reasonable care to provide safe appliances and machinery.

So the question is presented in this case whether or not there is any element in it which may show the master had omitted to exercise reasonable caution and care in this matter as to things about which the plaintiff himself was not fully appraised and of which he was not fully aware at the time he did the work and received this injury. There are cases found in various states which I have not now time to cite, which hold the rule to be this, substantially: That while the master is in duty bound to furnish appliances that are reasonably safe, and must not furnish any materials for his workmen to work upon that are defective and unsafe, yet he is also charged with the duty of using ordinary and reasonable care to determine whether they are safe or not;

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and although he might not have known of the defect, still, if, by the exercise of ordinary and reasonable care he would have known it, he will be charged with a notice of a defect that subsequently is shown to exist. These authorities hold as to the workman himself, that while he takes the chances of working with any defective appliances, or working in any dangerous situation, regarding which he knows the facts, except where he has had a promise that the defect will be repaired and relies on that and continues in the employment, yet he is as much chargeable with the risk as is the master; and that it is only such matters as he knows that he is thus chargeable with; and that he is not under the same obligation always to institute inquiry and make search and determine beforehand whether or not there exists or may exist some defect about the machinery or appliances about which or with which he is working. While that rule as thus stated may be too broad, we think there is and must be recognized a difference in the rule as applied to the master and the workman; that while it may not be that it will be always necessary that the workman have actual knowledge of a defect, or the dangers therefrom, and there may be cases where the circumstances are such that he is grossly negligent by failing to inquire under the particular circumstances of some particular case; yet it cannot be said that he is under the same obligation to search for hidden defects or possible dangers that the master rests under.

This case presents the question in line with these considerations, whether the danger and the defects which here existed were such that the master ought to have known about, or the servant might be excused in not knowing. In this connection it was left to the jury—and we think it might be left to the jury—to consider who the plaintiff was; that he had never been an independent workman himself

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planning buildings, or raising walls, or determining their thickness, just how they should be laid up; but he was working all of the time that he was working as a mason under the direction of others; and while he had acquired general skill and knowledge in the laying of walls in general, it does not appear that he had at any time been called upon to exercise his judgment regarding the safety of laying up such a wall as this. Neither does it appear with entire certainty that the danger that really existed of the falling of this wall, being built as it was, was such as would be perfectly apparent to the jury upon the mere recital of the facts of the case. The margin along this line is not very large. It is a difficult and narrow margin. And to say whether this is a case where the facts alone should have been given to the jury without the aid of experts, the jury being left to determine whether or not the danger did exist or would exist, or was such in kind or character as that the master ought to have been held chargeable with a knowledge of, and should have been held to have provided against it, is a matter that may now fairly go for the consideration of the supreme court; because while the supreme court will not look into the testimony to determine the weight of the evidence as bearing upon the one side or the other, the questions that are made and the exceptions that are taken as to the introduction of evidence and the rulings of the court as to expert testimony, and the final charge of the court and its action upon the requests, will present as a matter of law we think substantially the same question.

Now, briefly as to the rulings upon the requests of the defendant below and the exceptions taken: There were no exceptions to the charge, except the exceptions taken to the refusal to charge certain requests proffered by defendant's counsel. There are only four or five of them. Defendant, by his counsel, excepted to the refusal of the court to give to the jury in charge defendant's request No. 1.

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That was a general request, that under the proof the jury would be directed to return a verdict for defendant. Based upon the considerations that I have already alluded to, we think that the court did not err in refusing that there was enough in the case to go to the jury. Defendant likewise excepted to the modification by the court of defendant's request No. 3. The request was:

"The plaintiff is presumed to know the dangers incident to his business and to the work he engages to do, and the defendant has a right to assume and rely upon the plaintiff's having the knowledge."

The court says:

"Now, that we give you in charge, gentlemen; but we say to you that the evidence furnishes you with a knowledge of how long the plaintiff had been engaged in that business, and under the charge and direction of defendant. All this will be considered by you in that connection, because the parties will be presumed to have that knowledge which their relations necessarily covered to each other."

While that is not very clear, or the idea which the court had in view, perhaps, is not clearly expressed, yet we think that that request, might have been somewhat misleading: without some words calling attention to the facts of the case, and that the jury, as the case went to them, had a right to consider in what manner, during the four years of his apprenticeship, the plaintiff had been working, and how far; therefore, the defendant below had a right to rely upon the plaintiff's experience and knowledge.

"Any danger which the defendant could by the exercise of ordinary care ascertain, the presumption is that plaintiff could also ascertain."

Judge Doyle: "Is that given?"

The Court: "Yes." (To the Jury:) "We are asked to say to you, gentlemen, that 'The mere fact that no scaffold was furnished higher or different from what was furnished cannot be the basis of any recovery in this case.' And,



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in that connection, is added: 'There is no claim that any complaint was made of the want of a scaffold and a promise that it would be supplied, which induced plaintiff to continue in the work.'

The question whether there was any such claim made, being answered that there was no claim made, then the court gave that request. Then occurred the following instruction:

"The conditions that would be deemed safe to workmen with ordinary skill in the business, would be justly regarded as safe by the defendant, unless the proof shows that by reason of some peculiar knowledge the defendant knew that it was unsafe"

Also:

"The fact that the plaintiff had not completed his four years' apprenticeship, makes no difference. If he had ordinary intelligence, he was bound to apply it, and if by the exercise of ordinary care he could have known the conditions he was working under, he is presumed to know them, and the law charges him with such knowledge."

The fifth request was proffered in this way:

"The mere fact that no scaffold was furnished higher or different from what was furnished, cannot be the basis of any recovery in this case."

Then the court added:

"It is true as a matter of law that the mere absence of the scaffold itself, at a particular height, would not warrant a recovery. The plaintiff can recover only because of injury received by him caused by negligence upon the part of the defendant, and the mere fact of the scaffold not being at a sufficient height, standing by itself, would not warrant a finding by you of a judgment against the defendant."

We do not see how that modification could or did result in any prejudice to the defendant below, or gave a rule of law that would tend to mislead the jury, or that it applied any principle that ought not to be applied in this case against the defendant below.

While I am sorry to have been obliged to stumble over

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Fort Orange Oil Co. v. Wichman.

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this matter in this way picking up as I could along, and perhaps omitting some things that ought to have been mentioned, I will say that we have considered the whole record, and while some of us, and perhaps all of us, think that upon the real facts of the case it may be doubtful whether it presents a case that ought to finally result in the verdict that was given, yet we are unable to say, applying the ordinary rules governing reviewing courts, that the record presents any matter so erroneous and prejudicial that we ought to disturb the judgment. For these reasons the judgment will be affirmed.

I will say in passing, that viewing the injury that was testified to as having been received by the plaintiff, it would not appear that the jury were led into giving any extravagant verdict, so far as the amount is concerned, by any passion or prejudice.

The judgment will be affirmed, but a certificate of reasonable cause for the proceedings in error will be entered.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before King, Heynes and Parker, JJ.

FORT ORANGE OIL CO. v. JOHN F. WICHMAN.

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*Contract partly printed and partly written—Writing controls.*

- (1). In the construction of a contract, (oil and gas lease), partly printed and partly written, where there is an ambiguity arising out of inconsistency of the printed with the written parts, the written parts will control.
  - (2). (Provisions as to "location money" construed, and held to apply to such wells only as lessee was by the term of the lease required to drill.)
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Error to the Court of Common Pleas of Lucas county.

PARKER, J.

On the third day of January, 1893, the defendant in error, being the owner of certain lands in Sandusky county,

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executed what is commonly termed an oil and gas lease upon the same, the grantee or lessee therein named being his son John H. Wichman. Certain rights and privileges are thereby conferred upon John H. Wichman, his heirs, successors and assigns. This instrument contains a provision requiring the lessee or his assigns operating under this lease to pay \$150.00 for each location of certain oil wells to be drilled by the lessee or assigns. The question presented for consideration in the court below and here is whether this lease requires that the lessee or assigns shall pay this location money on four wells which are *required* to be drilled under it, only, or upon any other wells that *may* be drilled in addition to the four.

It appears that by certain assignments the Fort Orange Oil Co. came to be the owner of this lease, and vested with the rights of the lessee; that before it became the owner, the four required wells had been drilled upon the premises, and the location money had been paid on account of those four wells. Since The Fort Orange Oil Co. has come to be the owner of the lease, it has drilled nine additional wells. The action was instituted for recovery on account of ten wells, but it developed upon trial that if there was any liability for any wells in addition to the four, it was for nine only.

As appears from the bill of exceptions, upon the trial of the case the parties agreed upon the following facts:

"It is agreed by and between the parties hereto that since the assignment of said lease to the defendant, it has located and drilled nine wells on said premises, one of which produces absolutely no oil, three were light wells, and were operated for a very short time only, five were fair wells and have been regularly operated. That the defendant has also erected machinery over and cleaned out one oil well drilled on said premises by the Paragon Oil Company before the date of said lease, which well has so been operated by defendant. It is further stipulated that nothing herein contained shall prevent the parties from offering further proof, subject to the usual objections and exceptions."



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And upon the theory that there was some ambiguity in the lease with reference to the matter in dispute, the court admitted oral proof of additional facts in order that the court might be in possession of the facts and circumstances surrounding the parties at the time this lease was made, and in order that the court might be advised as to the construction the parties themselves had by their conduct put upon the lease with reference to this matter.

The trial resulted in a finding and judgment in favor of the plaintiff below and against the defendant below for \$150.00 on account of each of these nine wells, making a total of \$1350.00, and interest.

Our attention has been called to and we have carefully considered the opinion of the learned judge of the lower court. He seems to have devoted to this question considerable thought and attention, and his opinion is certainly entitled to great respect. I therefore regret, since the duty has fallen upon me to announce this opinion, that I have not had an opportunity to formulate our ideas and reduce them to writing, in order that I might present our thoughts upon the subject with more care and clearness, and perhaps with more force, since we find ourselves unable to agree with his conclusions.

The lease in question reads as follows:

“In consideration of the sum of (one) dollars, the receipt of which is hereby acknowledged, (John F. Wichman, of Sandusky county Ohio), first party, hereby grants unto (John H. Wichman) second party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purposes of drilling and operating for oil, gas, or water, to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil, gas or water, taken from the said premises, excepting and reserving, however, to first party the (one-sixth) part of all oil produced and saved from said premises to be delivered in the pipe line with which said second par-

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ty may connect its wells, namely all that certain lot of land situated in the township of (Madison) county of (Sandusky) in the state of (Ohio), bounded and described as follows, to-wit: (then follows a description of a tract of ninety acres), to have and to hold the above premises on the following conditions. If gas only is found, second party agrees to pay (three hundred) dollars each year for the product of each well, while the same is being used off the premises, and the second party to have gas free of cost to heat (all) stoves in dwelling house during the same time. Whenever first party shall request it, second party shall bury all oil and gas lines (below plow depth), and pay all damages to growing crops by reason of burying and removing said pipe lines. No well shall be drilled nearer than (300) feet to the house or barn on said premises, and no well shall occupy more than one acre. In case no well is completed within (60) days from this date, then this grant shall become null and void. The second party shall have the right to use sufficient oil, gas or water, to run all necessary machinery for operating said wells and also the right to remove all its property at any time. (A second well to be drilled within four months, a third well within eight months, a fourth well within twelve months from date of lease, second party to pay \$150. 00 for each location when the location is made, wells to be located by both parties. If wells are not drilled as stated, second party only to hold fifteen acres for each well so drilled. Second party is also to protect the lines. Steam lines to be laid north, south, east and west. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

“In witness whereof the parties hereto have set their hands and seals this (23d) day of (January) A. D. 189(3).”

It is signed by the parties, witnessed and acknowledged in due form as required by law. For convenience in arriving at a better understanding of the question, the stenographer may enclose in parenthesis the written portions of so much as I have read.

It will be observed that the language is not in all respects

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grammatical—that the construction is not grammatical. That arises largely, but not entirely, out of the fact that a printed blank is used, and care does not seem to have been exercised to make such slight alterations as would be required to make the instrument read grammatically. In the provision “the second party shall have the right to use sufficient gas, oil or water to run all necessary machinery for operating said wells, and also the right to remove all its property at any time,” while this sentence is grammatical in form, yet it will be observed that up to that point in the lease there had been no wells referred to that could have been properly described as “said wells”, the only well theretofore referred to specifically being the one well which the lessees were required to complete within a period of sixty days. This seems to have arisen from the circumstance of the use of a printed blank, and a lack of care to make the written and printed portions entirely conformable the one to the other. Similar inconsistencies are doubtless due to the same cause. Following the sentence which I have just read comes a part of the lease which is written, and with respect to which this controversy and difference of opinion arises.

“A second well to be drilled within four months, a third well within eight months, and a fourth well within twelve months from date of lease; second party to pay \$150 for each location when location is made, wells to be located by both parties. If wells are not drilled as stated. second party only to hold fifteen acres for each well so drilled. Second party is also to protect the lines. Steam lines to be laid north, south, east and west.”

Then follows the provision which is printed in the form, beginning with the words “It is understood between the “parties,” etc. The question turns upon the construction to be given to this written part of the lease, and more especially to these words: “Said party to pay \$150 for each location when location made.” We are to determine

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whether those words refer to *all* wells that *may* be drilled under this lease, or whether they refer to the four wells the drilling of which is *required* under the lease.

It will be observed that there is no requirement to drill more than four wells. With reference to the four wells the lease contains a provision that in the event that the first is not drilled within sixty days from date, the grant shall become null and void. If the four are not drilled, the first having been drilled, then the lessee is to hold on account of each well drilled less than the full number of four, but fifteen acres of the ninety.

In construing this lease we apply the well settled rule, that in cases of ambiguity arising out of inconsistency of the written and printed parts of a contract (a printed blank form having been used), the written parts will control.

In our judgment the provision as to the payment of \$150 on account of each location applies to the four wells only. We are brought to this conclusion not only from a consideration of the language as we find it in the lease, but from a consideration of the fact that this part of the lease is written, while other provisions referring generally to wells that are not required to be drilled, but may be drilled, are printed; and from a consideration of the facts and circumstances surrounding the parties, and the results to be accomplished by the parties, that would naturally be affected by the provisions respecting this location money. We are not aided a great deal by the oral testimony as to the conduct of the parties to this lease after the time that the Fort Orange Oil Co. came to be the owner thereof. It may be said, however, that the testimony does tend to show that the lessor did not seem to regard his right to recover location money on account of any wells in addition to the four as being clear. At all events, he did not proceed with promptness to assert his right to such location money. According to his own testimony, he took some part in the

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location of the wells first drilled upon the premises by the Fort Orange Oil Co., and upon the occasions when those locations were made he did not assert any right to this location money, or make any demand for it, those being the times it became due and payable, if at all. It appears, however, that after a well which is designated as No. 7, was drilled, he made a demand for location money on account of the wells previously drilled. This is disputed by an officer of the Fort Orange Oil Co. upon whom plaintiff claims he made this demand. But assuming that he did make the demand at the time and place and in the manner stated, it was not made at the time or place that one believing that he had a clear right to receive this location money would have made the demand, viz: upon the premises at the time the location was made, he himself being present and assisting in making the location.

This demand, assuming that it was made, does not appear to have been followed by any other demand or any other effort to collect this location money, until after the nine wells were completed. Then his claim appears to have been made with some promptness and vigor, resulting in this suit. As I say, we do not give a great deal of weight to that, but we give more to the considerations that must have influenced the parties to the contract when fixing its terms. A large number of actions have been brought before this court involving the rights of lessors and lessees under leases of this character and the lessee has always been urgent for the drilling of more wells and with greater promptness and rapidity than the lessee has been willing to concede his right to have or demand. The interests of the lessor seem to be subserved, according to the opinion of lessors generally, by the drilling of a great many wells and the drilling of those wells promptly, so that the lessor may receive from the leased premises at as early a date as possible his share of the oil, generally one-sixth. The cost of drill-

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ing and operating the wells falls upon the lessee. He is therefore found reluctant and sometimes tardy in the prosecution of this work, generally desiring that he may be relieved from the drilling of a great many wells, or from pushing the prosecution of this work, so that he may be saved the expense of putting down many wells, and operating them, and may secure the oil that he is entitled to under his lease from a few wells rather than from a great many. In the case at bar the interest of the lessor would dictate that no obstacle should be placed in the way of drilling additional wells other than the four the drilling of which he has specifically required. His interest would not be injured but would be promoted by the rapid drilling of additional wells. Therefore we cannot conceive that under such circumstances the lessor would desire or intend that the lease should be so framed as to place obstacles in the way of drilling additional wells. It is apparent that he would desire to remove all such obstacles. So many cases have come before us indicating that this is the attitude and these the objects of parties upon entering into these contracts called "oil leases", that we cannot ignore the knowledge thus acquired in the case at bar.

In order that the lessee may secure the right to all the oil underlying the whole premises he is required to drill four wells. If he drills a less number than four, he fails to obtain this right as to some part of the land, i. e., upon the drilling of one well he acquires a right to the oil underlying fifteen acres; upon the drilling of the second well he acquires a right to the oil underlying fifteen acres more; the third well gives the right to fifteen acres more, making forty-five acres; and upon the drilling of the fourth well, the lessee's right to the remainder of thirty-five acres (in all ninety acres) is established. It is seen, therefore, that by these provisions whereby the right of the lessee to drill upon and obtain the oil underlying the premises is made to

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depend upon the drilling of these wells, an inducement is offered for the drilling of such wells and the payment of the location money of \$150.00 for each well; so that the lessor has some assurance that the wells will be drilled, and that he will obtain this location money. If the wells are not drilled, his land or part thereof, as heretofore pointed out, remains unaffected by the lease, and he is at liberty to lease to another or drill upon it on his own account. But, as before indicated, there is no such inducement to the drilling of additional wells. The lessee may if he chooses (laying aside for the moment the provision as to protecting the lines), cease from drilling and depend upon the operation of the four required wells for the production of the oil underlying the premises.

No disadvantage can result to the lessor from the drilling of additional wells, but only advantage. Therefore the lessor would not be inclined to impose what might be regarded as a penalty upon the lessee if he should seek to sink additional wells. We feel bound to believe that the parties had these considerations in mind when they drafted the lease.

It is urged in argument that the words "wells to be located by both parties," appearing in the written clause, applies to all wells that may be drilled, and that since it is a part of the same clause and sentence as that containing the provision as to location money, it throws light upon the latter and clearly indicates that it also applies to all wells. We are of the opinion that the word "wells" as here used applies to the four wells only. Since a part of his land is to be held and operated on account of each of these wells, i.e., fifteen acres for each of the first three and forty-five acres for the fourth, and since the tracts thus to be held are not distinctly marked out or defined, but would naturally be held to be tracts contiguous to the wells drilled on account thereof, the lessor would have a special interest in the

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location of these wells. He would also have a special interest therein growing out of the fact that the lessee might drill a less number than four, or at all events, not more than four, and the lessor would naturally desire to have the required wells so located as to develop as much as possible of his land. This having been accomplished and the drilling of additional wells being optional with the lessee, who has become the owner of all of the oil underlying the whole premises (less the royalty), the same consideration that would impel the lessor to forego any claim for additional location money would impel him to refrain from interfering with the lessee in his further operations upon the premises. Again, we find in the lease this provision: "No well shall be drilled nearer than 300 feet to the house or barn on said premises," etc. It is clear that this is not intended as a limitation upon the right of the lessor to have wells drilled at one place on the premises, but is intended as a restriction upon the right of the lessee to drill upon the premises. Now if the lessor has a right to participate in the location of all wells, which would involve a right to object to drilling at places not agreed upon by himself, then this provision as to drilling within 300 feet of the buildings is idle and useless. We are bound to so construe this instrument as to, if possible, give effect to all its parts and provisions. To our mind this provision, taken in connection with that as to the location of wells, indicates clearly the intention of the parties that both should agree upon the location of the four required wells, but that the lessee alone should determine the location of any additional wells, subject to the restriction that they should not be located nearer to the buildings than 300 feet.

This lease also contains a provision in the written part to which I have called attention "that second party is also to protect the lines" A construction has been put upon similar language in oil leases by the courts; viz:—that if necessary



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to the protection of this tract, in order that the lessor may receive his share of the oil supposed to be underlying the district of which it is a part, the lessee shall drill additional wells. We can hardly conceive that with respect to that obligation, which is imposed upon the lessee, the lessor would undertake to deter him from doing that which would be for the special advantage of the lessor, by adding a provision that when he came to drill the additional wells necessary for the protection of the lines, he should pay \$150 to the lessor on account of each of such wells. And yet that would follow from an adoption of the construction of his lease urged on behalf of defendant in error.

After a careful consideration of what must naturally have affected the minds of the parties when they sat down to prepare this lease, we are led to the conclusion that the lessor did not intend nor desire that any stipulation should be contained in this lease which would deter the lessee from fully and promptly developing and producing the oil underlying lessor's land. Therefore, we are unanimously of the opinion that the meaning of this language as it is written and as it was intended is, that \$150.00 of location money should be paid each for the four wells only. This conclusion brings us to a reversal of the judgment of the court below.

*King & Tracy, for Plaintiff in Error.*

*Campbell, O'Farrell, and Beard & Beard, for Defendant in Error.*

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Smith v. The Butler & Ward Co.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before Haynes, King and Parker, JJ.

WILLIAM H. H. SMITH v. THE BUTLER & WARD CO.

*Guaranty—When binding as to past transactions as well as to future advances—Consideration—*

(1). A guaranty is binding and enforceable as to past transactions or advances though as to these alone it may be without consideration, if it also covers and is supported by the consideration arising out of future transactions or advances.

*Same—*

(2). Whether the principle that "the promise to do or the doing of that which one is already under legal obligation to do, does not form a consideration for a promise," applies to a promise made by a third person to whom the promisee was not originally bound—*Quere.*

Error to the Court of Common Pleas of Lucas county.

PARKER, J.

This is a proceeding brought to reverse a judgment obtained by the defendant in error against the plaintiff in error in the court of common pleas of this county.

The cause of action stated in the petition in the court below arises out of the following circumstances: Charles Truman & Co., in the years 1895 and 1896, were manufacturers of bicycles in the city of Toledo. The Butler & Ward Co., a corporation under the laws of New Jersey, were manufacturers and vendors at an eastern city of certain bicycle parts, among them bicycle saddles. In the season of 1895 Truman & Co. entered into negotiations with the Butler & Ward Co. for the purchase of certain bicycle saddles. In the course of that negotiation it came to the knowledge of The Butler & Ward Co., that W. H. H. Smith, plaintiff in error, was guaranteeing the performance of contracts entered into by the Truman Co. The Butler & Ward Co. thereupon applied to him for a guaranty of the payment of such indebtedness as might be contracted by Truman & Co. in the purchase of bicycle parts from them, and he gave a written guaranty, which reads as follows:

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“Toledo, O., 5-13-1895 (May 13, 1895.)

“Messrs. Butler & Ward,

“Gentlemen: Your favor of the 11th inst. is at hand. I will guarantee the account of Truman & Co. for the year (1895.)

“Respectfully,

“W. H. H. Smith.”

On July 13th, 1895, Truman & Co. gave an order to the Butler & Ward Co. for 1000 '93 saddles, styles W and X, deliveries to be specified later, with a clamping pin 7-16 hexagon head, and other directions about the style of the saddles. The prices to be paid were stated in the order, and this is stated with reference to deliveries:

“It is understood that deliveries are to commence as soon after Oct. 1, 1895, as we shall specify—not later than Sept. 1, 1895—and the order to be completed by June 1, 1896. Terms sixty days.”

This order was accepted by the Butler & Ward Co., and in pursuance of requests from Charles Truman & Co. they from time to time shipped bicycle saddles under this contract for 1000. The whole number of 1000 was not delivered during the year 1895, and on December 19, 1895, Butler & Ward wrote to plaintiff in error as follows:

“Mr. W. H. H. Smith,

“Toledo, O.

“Dear Sir:

“Your guaranty for goods purchased from us by Chas. Truman & Co. of Toledo, O., for the year 1895 will expire on the 31st day of this month. We have their order for a number of saddles to be shipped during the present season of 1896, and we write to inquire if your guaranty will cover purchases for the coming year. If so, kindly put the same in writing and send it to us at your earliest convenience, and greatly oblige,

“Respectfully yours,

“Butler & Ward.”

It will be observed that this is not in the form of a re-

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quest for a new guaranty, but rather of a construction of the guaranty already given. In response to this the plaintiff in error, on December 21, wrote as follows.

“Messrs, Butler & Ward:

“Gentlemen:—Your favor of the 19th inst, is at hand. The necessity for this guaranty is not apparent for 1896, as I think Chas. Truman & Co. are in good shape. Still, if it will facilitate their business I am willing to guarantee their bills with you for 1896.

“Yours truly,

“W. H. H. Smith.”

It will be observed that there is a slight change in the phraseology of this guaranty from that used in the guaranty of May 13, 1895, and some deviation from the phraseology used in the letter of Butler & Ward of December 19th, requesting some further assurance, the guaranty of May 13, 1895, being “I will guarantee the account of Charles Truman & Co. for the year 1895.” The inquiry on the part of Butler & Ward is whether Smith’s guaranty will “cover purchases for the coming year”, and the response being that he is willing to “guarantee their bills for the year 1896.”

In the year 1896, 200 saddles (I believe that is the number) were furnished, completing the contract for 1000 which had been entered into in the year 1895, and another 100 saddles were furnished which were not covered by that contract, but it is conceded that the guaranty of December 31, 1895, covers that 100. It is claimed that by the terms of the guaranty of May 13, 1895, and also by that of December 31, 1895, the 200 saddles furnished in 1896 were covered. These 300 saddles were not paid for by Truman & Co. They made default—became insolvent. Smith, the guarantor, failed to pay, and this action was instituted to recover the price of the 300 bicycle saddles so furnished.

It is not clear that the guaranty of the 13th of May, 1895,

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covers the 200 bicycle saddles furnished in 1896 under the contract for 1000. On the other hand, it is not clear that it does not cover them. But we do not pass upon that. Assuming that it does not cover the saddles, it is urged here by the plaintiff in error that there was no consideration for the guaranty of December 21, 1895, with respect to the 200 bicycle saddles furnished under the contract for 1000 which had been entered into prior to the time of the guaranty of December 21, 1895. The principle is invoked by the plaintiff in error that a promise to do or the doing of that which one is already under legal obligation to do, does not form a consideration for a promise, and that therefore the guaranty of December 21, 1895, was, as to the plaintiff in error, with respect to these 200 saddles, without consideration. Assuming that this principle would be applicable to the case of a promise made by a third person to whom the promisee was not originally bound, we do not think it can be successfully invoked by plaintiff in error under the circumstances of this case. The acceptance of the order for 1000 saddles was upon the condition or understanding, as clearly expressed by the correspondence, that payment should be guaranteed by the plaintiff in error. The defendant in error was not bound, in our opinion, to furnish the saddles called for after the expiration of the time limit of his guaranty of May 13th, 1895, until that time had been extended or a new guaranty given covering the saddles called for. Hence the furnishing of the 200 saddles constituted a consideration for the guaranty of December 21, and the principle invoked by plaintiff in error is not applicable. And this is so whether the guaranty of December 21, 1895, be considered as a mere extension of that of May 13, 1895, or whether it be considered as an original guarantee. Upon another ground we think the judgment of the court of common pleas in this case is right, and should be sustained. The guaranty of December 21, 1895, is unquestionably supported by the con-

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sideration arising from the furnishing of the 100 saddles not covered by the order of 1895 for 1000 saddles, and by its terms it covers the 200 included in that order but furnished in 1896. Now, a guaranty is binding and enforceable as to past transactions or advances though as to these alone it may be without consideration, if it also covers and is supported by the consideration arising out of future transactions and advances. The authorities in support of this are numerous, clear, and satisfactory.

For the reasons given the judgment of the court of common pleas will be affirmed.

*George H. Beckwith*, for Plaintiff in Error.

*I. N. Huntsberger*, for Defendant in Error.

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(Third Circuit—Paulding Co., O., Circuit Court—Oct., Term, 1898.)

Before Day, Price and Norris, JJ.

J. A. WOOLARD et al. v. GEORGE L. FAVORITE.

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*Sheriff—Refusal to pay over—Liability of bondsmen.*

- (1). Since the act of April 20th, 1868, S. & S., 734, sec. 1218, R. S., the failure of a retiring sheriff to pay over to his successor in office all moneys received by him and remaining in his hands constitutes a breach of his official bond.

*Same—*

- (2). The failure of a sheriff, on the order of the court to pay out to the party entitled, moneys in his hands as such officer does not, alone, constitute a breach of his official bond so as to make the sureties thereon liable. To have such effect, the party entitled to payment must make demand or offer reasonable opportunity for such payment.

*Two successive bonds during one term of office—Second bond liable unless liability of first shown—*

- (3). A sheriff serving a single term under two bonds in force successively, failing to pay over to his successor in office, moneys received and remaining in his hands as such officer, at the expiration of his term, makes breach of his official bond; and the bond last in force is liable for such breach, unless it be affirmatively shown that such breach became absolute during the existence of the first bond.

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Woolard et al. v. Favorite.

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Error to the Court of Common Pleas of Paulding county.

DAY, J.

Plaintiff's action in the lower court was predicated upon an alleged breach of the conditions of a sheriff's bond, and was to recover \$178, and interest, alleged to be due plaintiff from the sheriff and the sureties on his said bond, by reason of such breach.

The particular breach complained of consisted in failing and refusing to pay over to the person entitled to receive it, or his successor in office, moneys which came into his possession as said officer. Judgment is prayed against the sheriff and the sureties on his official bond.

Three of the defendants, named Woolard, Atwill and Windiate, make answer; the other defendants made default. The answer shows, in substance, that Swaine, the sheriff whose official bonds are in question, was elected sheriff of Paulding county at the general election in 1887, for the term commencing in January, 1888. That shortly before his induction into office in December, 1887, he duly gave an official undertaking, which was accepted and approved, with sureties other than the three answering defendants, and under said bond said Swaine entered upon the duties of the said office of sheriff, and continued to act in that behalf under said bond until on September 22nd, 1888, when upon proper proceedings had, a new bond by the sheriff was required, given, duly accepted and approved, with the answering defendants as sureties; that the said sheriff duly made a sale of real property on July 7th, which sale was by the court approved and confirmed on July 12th, 1888, at which date the court ordered the sheriff to pay over the proceeds of the sale to the parties entitled according to the priorities then declared, and the residue, if any, to George L. Favorite, who held the equity of redemption in the land sold, which order of the court for the payment of money to Favorite, the said sheriff, then and always omitted and

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failed to obey and perform, and thereby and then failed to perform an official duty, whereby the sureties on his official bond became and are liable. The entire contention of the answering defendants, based on the facts stated, is in few words: that the breach of official duty for which the sheriff's sureties became liable, occurred on July 12th, 1888, and long before the answering defendants became sureties or assumed any liability at all, and for that reason the sureties on the original bond are alone liable.

A demurrer was sustained to this answer, and the defendants not desiring to amend or further plead, a judgment, was entered on the petition for the plaintiff and against the answering defendants for the amount of the claim asserted, with interest and the costs. This action of the court did not content the answering defendants, so they prosecute error and seek a reversal of the judgment because of prejudicial error, said to be manifest on the face of the record.

The only question presented is as to the propriety of the ruling and judgment of the lower court upon the demurrer to the answer. There is and can be no dispute or difference of opinion between counsel and the court as to the liability of the sureties on an official bond for a breach of official duty on the part of the sheriff, if the breach occurred during the existence of the bond; or of non-liability, if it occurred before or after the bond had a legal valid existence, and so in such case it becomes all important to ascertain and determine the precise date on which the breach became absolute. If in July, there was no second bond in existence, and the sureties on the original bond became alone liable; if after September 22nd, 1888, the original bond having become invalid, the sureties on the second or new bond became alone liable.

The theory of the plaintiff in error is, that the order of the court to pay over moneys in the sheriff's hands to the party entitled, and an omission of the sheriff to do so, con-



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stituted such a breach of official duty as made the sureties on the then existing bond liable, and the 31st Ohio St., 378, is cited as authority for the contention. That authority does not sustain the claim. We think it has no application to the facts pleaded under the law as it now is. The facts upon which the decision was predicated arose prior to the passage of the act of April 30th, 1868, S. & S., 734, when by law there was no duty resting on a sheriff to pay over moneys remaining in his hands to his successor in office. Then the sheriff dealt directly with, and paid out money in his hands, on the order of the court, to the party entitled to receive it; and he could not acquit himself or his sureties, by paying to his successor, any more than by paying to a stranger. The act of April 30th, 1868, changed all that, and at all times since that date it has been the lawful duty of a sheriff, to pay over to his successor in office, all moneys remaining in his hands upon his retiring from office, and a failure to do so is an absolute breach of official duty, making the sureties on his bond liable. The act of April 30th, 1868, by subsequent codification, has become sec. 1218, Revised Statutes., and was the law at the date of the transaction in this case. The section is as follows: Sec. 1218:

“The sheriff upon retiring from office, shall pay over to his successor in office all moneys received by him, then remaining in his hands, and deliver to his successor in office all notes, mortgages, and other evidences of indebtedness, and all books, blanks and stationery belonging to his office; and each sheriff shall demand and receive from his predecessor the books and papers aforesaid”.

The provision is mandatory: “he shall pay over to his successor all moneys received by him and remaining in his hands”. A failure to obey this mandate of the law would clearly be an infraction of a legal duty. This provision of the law, however, would not prevent an absolute breach of duty prior to the date of expiration of the term of office. A

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complete breach might very well occur before that time. As for instance in the case before us, if the party entitled to receive the residue was present, fully identified as the proper person, and was demanding payment of money rightfully his own, in the sheriff's hands, and the sheriff, conceding the rightness of the demand, refused and omitted to pay over, such conduct would clearly, we think, constitute a complete breach of duty, making the officer and his sureties directly liable to an action on the bond. But it was not the duty of the sheriff to pay out, even on the order of the court, in any event and under all circumstances, or at all, unless reasonable opportunity for payment were presented. If the party entitled to be paid, was absent or unidentified to the reasonable satisfaction of the sheriff, or if, for any sufficient cause, the propriety of payment out was a matter of doubt with the officer, it would be his duty to withhold payment until his reasonable doubts were removed, and in doing so he would only be in the exercise of reasonable prudence, and would not be guilty of any infraction of duty. None of these suggested facts are made to appear in the answer. The only averment in the answer on this head is, that on July 12th the court ordered the residue of the money paid out to the owner of the land, and that the sheriff failed and refused to pay the same. The burden is on the party seeking to avail himself of the fact of a breach to state all the facts, or sufficient facts to clearly show that a breach has occurred. In our opinion, the answer does not do this; the facts stated are not sufficient to constitute a defense to the petition, and the lower court did well to sustain the demurrer. We perceive no error in the record, and the judgment is affirmed, with costs.

*Snook & Wilcox*, for Plaintiff in Error.

*W. H. Phipps*, for Defendant.

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The N. Y., C. & St. L. Ry. Co. v. Schaffer.

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(Sixth Circuit—Huron Co. Ohio, Circuit Court—Dec. Term, 1898.)

Before King, Haynes and Parker, JJ.

THE NEW YORK, CHICAGO & ST. LOUIS RAILWAY  
COMPANY. v. FRANK SCHAFFER.

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*Blacklisting Employee—Liability of R. R. Co. for damages.*

Where railroad companies mutually agree that they will not employ any workmen who may have been discharged from or may have quit the service of any of the companies, parties to such agreement, unless the applicant shall present a consent from the parties for whom he last worked, or a "clearance", showing that he did not engage in a certain strike, it becomes the duty of a company, party to such agreement, upon the discharge of an employee who did not engage in such strike, upon his application therefor, to furnish to him evidence of its consent to his employment by such other company, or a "clearance" card showing that he did not engage in such strike; and a failure to do so, whereby such person is prevented from obtaining employment with such other company, constitutes an actionable wrong, and compensatory damages may be recovered therefor; and if such consent or letter shall be withheld maliciously, exemplary damages may be awarded.

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Error to the Court of Common Pleas of Huron county.

PARKER, J.

This action was tried in the court below upon the second amended petition filed by the defendant in error, (plaintiff below), and the answer and the reply making up the issues.

There are two causes of action set forth in the second amended petition, but one of them was dropped out on the trial, and the case was tried on the second cause of action.

The petition is somewhat lengthy, and contains a number of averments which seem to us to be repetition, and others which are immaterial. The substance of what we deem material is as follows:

The petition sets forth that the defendant is a railroad corporation organized under the laws of the state of Ohio, operating a railroad. That prior to the first day of January, 1895, plaintiff was in the employ of the defend-

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The N. Y., O. & St. L. Ry. Co. v. Schaffer.

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ant performing the work of a brakeman at the rate of \$60 a month; that he had been a railroad employe for about twenty years; that he was, at the time of the grievance complained of, still a railroad man of good habits, well qualified by experience to engage in the business of a railroad brakeman; and he says that during the year 1894, there was, on a great many of the railroads in the United States, including the defendant, a strike known as the A. R. U. strike. That during all the time of this strike, to-wit, the summer of 1894, he was working for the said defendant company as a brakeman in its yards at Bellevue, Ohio; that he took no part in said strike; that he worked for said defendant during the entire time up to about the latter part of December, 1894, as above set forth, when he was granted a leave of absence by said company. That prior to the expiration of said strike, defendant entered into a conspiracy, agreement and understanding with certain other railroad companies having lines of railroads running into the city of Chicago, and also with other railroad companies in the United States, the names of which are unknown to the plaintiff, that they, the said railroad companies, would furnish each to the other information as to all their employes who had committed offenses, or who were charged with having committed offenses, and also as to all their employes who had quit work during said strike, which commenced on or about June 26th, 1894, and ended on or about August 6th, 1894, and as to all their employes who were members of the American Railway Union, and that such employes of any and all said companies would not be employed by any of said companies which formed the said conspiracy without a release and consent from the railroad company by which any such employe was last employed, said release or consent being commonly called by railroad men a "clearance". That such compact amounted to a conspiracy and agreement to blacklist and boycott said employes, the object

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and purpose thereby being to maliciously and willfully interfere with such employes as had previously terminated their employment with, or been discharged from the employment of either of the said companies.

Then follows averments as to the custom of the defendant company to grant such letters to its employes leaving its service, all of which we deem immaterial.

Then follows the averment that said defendant, although making said agreement and although well knowing that this plaintiff was not engaged in said strike, refused to give its consent to his being employed by other companies to which he applied for employment, and refused to furnish him the "clearance" above mentioned, and then and thereby prevented him from obtaining employment.

"That since said conspiracy of said railroads as above set forth, it is impossible for any one to secure employment unless he first presents the consent of the company for whom he last worked, or a clearance card showing that the applicant was in no way connected with said strike. That he has repeatedly asked the proper officers of said company for such consent or clearance, and said company has failed and refused to furnish him therewith, although well knowing that it would be impossible for him to secure employment without the same.

"Plaintiff says that since his said discharge as above set forth, he has made application for employment to various railroad companies in the country, and he says that said railroad companies have refused to consider his application unless he would first bring the consent of the defendant or a clearance above described.

"That because of the failure and refusal of the defendant to grant its consent or to furnish to him such clearance, and for no other cause, he has been denied the right to contract for and obtain employment with any of the railroad companies of the United States, and has been prevented from obtaining employment, and has been prevented from supporting himself and those dependent upon him by his said trade or occupation in which he has been engaged a

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great many years, and that he is therefore damaged and injured by said willful, malicious and illegal acts of the defendant, and he prays for judgment in the sum of fifteen thousand dollars."

An answer was filed by the railroad company admitting its corporate capacity; that it was operating a railroad as alleged, and that the plaintiff had been in its employ for some period; but all the material averments of the petition upon which the right to recover is based are denied.

No demurrer was filed to this petition, but when the case came on for trial to a jury, objection was made to the introduction of any testimony under the petition, upon the ground that it did not state facts sufficient to constitute a cause of action. This objection was overruled, and the case went to trial, resulting in a verdict for the plaintiff below for five thousand dollars.

A motion for a new trial upon various grounds was overruled, and the case is brought here for our review.

The discussion before us has taken quite a wide range, but we consider it sufficient to give our conclusions briefly; and they are that, where railroad companies mutually agree that they will not employ any workingmen who may have been discharged from or may have quit the service of any of the companies, parties to such agreement, unless the applicant shall present a consent from the parties for whom he last worked, or a "clearance", showing that he did not engage in a certain strike, it becomes the duty of a company, party to such agreement, upon the discharge of an employe who did not engage in such strike, upon his application therefor, to furnish to him evidence of its consent to his employment by such other company, or a "clearance" card showing that he did not engage in such strike; and a failure to do so, whereby such person is prevented from obtaining employment with such other company, constitutes an actionable wrong, and compensatory damages may be re-

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covered therefor; and if such consent or letter shall be withheld maliciously, exemplary damages may be awarded. Such agreement amounts to a proscription of all working-men who do not hold such evidence of consent, or such clearance card, and the refusal of a company to give a consent or a card, amounts to a declaration to the other companies to which a man may apply for employment, that he is one of the proscribed class.

We do not pass upon the question which has been discussed by counsel, as to whether such companies may lawfully combine to prevent any class of working-men, for instance, such as are engaged in a certain strike—from obtaining employment with any company entering into such a compact; or whether they may agree not to employ a certain man or class of men for any cause, reasonable or unreasonable, or for no cause at all; but where the arrangement between the companies is such that failing to give evidence of consent or a clearance card, amounts to a representation that the person to whom it is refused belongs to a class not to be employed, whereas in fact, such person does not belong to that class, the representation is false, wrongful and actionable.

The wrong is similar in nature to slander of one respecting his vocation or calling. Such false representations need not, however, amount to slanderous utterances. It is sufficient if their effect is to prevent a person from obtaining employment.

As to the serious consequences of such interference with the right of one to obtain employment, we quote and commend the language of Judge Pratt in the case of *William Mattison v. The Lake Shore and Michigan Southern R'y. Co.* on page 276, of volume 2, of *Nisi Prius*:

“It is said in *Pollock on Torts*, speaking of the right to employment by an employe, that it is the most serious right affecting the laboring man's life. Now, it seems to me,—

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Steuer v. The Royal Cigar Co.

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with all due deference, of course, to the opinions of the courts which are adverse—that the employe's right to employment is equally sacred with the right of the employer to employ him; it is not only a serious right, affecting a man's life, but you may say that it is his life. The laboring man's employment is the only thing that stands between him and starvation, or what is very little less than starvation—pauperism, and it is for the public interest and for the public good that the right of a man to seek his own employment in any honest work which he may seek, should not be interfered with or violated."

Without entering upon a discussion of the evidence in this voluminous bill of exceptions, we simply state that from its examination we conclude that such a case as we say gives a right of recovery is stated in the plaintiff's petition and is fairly established by the evidence.

We find no error in the record, and the judgment of the court of common pleas will be affirmed.

*Vickery Bros.*, for Plaintiff.

*S. S. Williamson*, and *C. P. Wickham*, for Defendant.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Nov. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

EDWARD STEUER v. THE ROYAL CIGAR COMPANY, a Corporation.

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*Gambling—Playing billiard.*

Playing billiard, the loser to pay for the use of the billiard, is not gambling under sec. 3946, R. S.

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Error to the Court of Common Pleas of Cuyahoga county.  
MARVIN, J.

The case of Edward Steuer v. The Royal Cigar Company is a proceeding in error to the court of common pleas.

Suit was brought first before a justice of the peace by the Royal Cigar Company, which is a partnership, against



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Edward Steuer, charging that he was indebted to the Cigar Company upon an account.

Steuer answered that the account was for the use of a billiard and pool table, and that the account was incurred under such circumstances that the plaintiff was not entitled to recover.

The case was appealed to the court of common pleas and there tried, resulting in a verdict and judgment for the Cigar Company.

A petition in error is filed seeking to reverse that judgment.

The statute which is relied upon as a defense is, section §4269, Revised Statutes, and is as follows:

“All promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or any part of the consideration of such promise, agreement, conveyance, or other security is for money or other valuable thing whatsoever, won or lost, laid, staked, or betted, at or upon any game of any kind, or under any denomination or name whatsoever, or upon any horse race or cock fight, sport or pastime, or on any wager, or for the repayment of money lent or advanced at the time of any game, play, bet or wager, for the purpose of being laid, betted staked or wagered, shall be absolutely void, and of no effect.”

The bill of exceptions shows this state of facts: That Steuer visited a place of business carried on by the plaintiff below frequently; that in that place of business was a billiard and pool table; that games were played there under an arrangement well-known to the proprietor, that the loser of the game should pay ten cents for each game played; and this account upon which suit was brought accrued in that way.

He played games enough to come to somewhere between \$150.00 and \$200.00 where he had been the loser, at ten cents per game. Now he says that he can not be compelled to pay because of the section of the statute to which atten-

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tion has just been called. The question, then, in the case is, does the plaintiff below, the defendant in error here, make his claim for money won or lost at any game?

Our statute, section 6934, making it an offense to keep a place for gambling, or to have gambling devises in one's place of business, reads:

"Whoever keeps or exhibits for gain, or to win or gain money or other property, any gambling table (except billiard table,) or faro or keno bank, or any gambling devise or machine of any kind or description, under any denomination or name whatsoever", is guilty of an offense.

In the same section, it also says:

"Or keeps or exhibits any billiard table for the purpose of betting or gambling, or allows the same to be used for any such purpose," is guilty of an offense.

Now if the keeping of a billiard table to be used as this billiard table was used, constitutes the keeping of it "for the purpose of betting or gambling," then the man who keeps it is guilty of an offense under this statute, section 6934.

I suppose it has never been claimed, however, that the keeping of a billiard table, where the loser is simply to pay for the game, is an offense under that statute; but, if it is kept and used for gambling, it is an offense under that statute.

The question of whether it is gaming and is an offense on the part of the owner of the building or of the keeper who knows that the game is played, not because of any arrangement with him, because everybody knows it, and the evidence in this case shows that the proprietor did know that the arrangement was that the loser should pay for the game—but it does not seem to us that this constitutes the claim for money won or lost at a game in such sense as that term is used in section 4269.

The courts of different states have discussed this matter of what constitutes gaming and what constitutes the winning

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and losing of money at any game, and they have not agreed. In some states they have held that it is winning or losing money, to have an arrangement whereby one party shall pay, if losing; in others, it is held otherwise, and we are disposed to hold with the courts which say it is not gaming and not winning or losing money.

In *Blewett v. The State*, 34 Miss. 606, this language is used:

“To constitute gaming, one or the other of the parties must expect to profit by the game. Here neither could derive such profit, because neither was entitled to the fee paid to the owner of the table. Admitting that it is the rule of the game that the loser shall pay the fee, the owner has a perfect right to make his contract in this way, the law not prohibiting this mode of contract.”

In *the State v. Hall*, 32 N. J. Law Repts., 158, the court says:

“The third and last question propounded to this court, is whether a public ten-pin alley, kept for hire by the game, where the practice of the loser of the game paying for the use of the alley is habitually suffered, is a common gaming house.

“The solution of this question depends on the consideration, whether, under such circumstances the parties playing lay a wager on the game which they play. The transaction is this: the keeper of the alley lets it to players, on the condition that the loser shall pay him for its use. It would seem to be an unnecessary refinement to say, that when the players accept these terms, and play under them, that then one lays a wager with the other, dependent on the result of the play. It is obvious the parties do not play for gain—they play simply for amusement, and it seems like putting gloss on the affair to call this gaming.

“In the case of *The People v. Sergeant*, 18 Cow., 139, this precise subject came under the consideration of the supreme court of the state of New York, and the result was that it was declared that such a practice did not amount to gaming.

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“In *Blewett v. The State*, 34 Miss., 606, a similar view was expressed, and there are no opposing decisions. The place of amusement in question can not, on this ground, be declared illegal.”

But if it is gambling, it would be illegal in Ohio.

It does not seem to us that the suit is brought for money lost at any game in such sense as that word is used in the statute, and the judgment is affirmed.

*T. J. Ross*, for Plaintiff in Error.

*Chapman & Howland*, for Defendant in Error.

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(Eighth Circuit—Cuyahoga Co. O. Circuit Court—Dec. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

THE STATE OF OHIO EX REL. E. P. WILMOT and GEORGE P. KURTZ v. HUGH BUCKLEY, CHARLES P. SALEN, EDWARD ETZENSPERGER and EDWARD C. KENSEY.

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*General Laws—What are—*

- (1.) A general law is one which relates to or binds all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint. A law is not general in any correct sense of the term, but is special, where it is suspended in one locality where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. This uniformity is in the sense, that the law shall operate the same in all parts of the state under the same circumstances and conditions, and must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class.

*Election Laws for city and rural districts—Distinction between cities not admissible—*

- (2). The subject of fair elections is one in which the people of the entire state are interested, and laws regulating it must be general in their nature. There are sufficient reasons to make it proper and constitutional to have election laws that apply to cities as a class, that do not apply to country districts. So far as this classification is made in the laws of Ohio, they

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are constitutional. But this distinctive feature existing between cities and rural districts does not exist in cities as between themselves in any such marked degree as would make it a foundation for different legislation upon this subject as to them, and if these laws are laws of a general nature, any distinction made in them between cities is unconstitutional.

*Same—Sec. 2926b as amended in 1896 unconstitutional—*

- (3). Sec. 2926b, as amended in 1896, 92 Ohio Laws, 166, which provides for a board of elections in all cities of the first and second class, "except Mansfield and cities of the fourth grade of the first class (Canton)" to be appointed by the mayor, is not a general law, as it makes a distinction between cities, by excepting from its provisions the city of Mansfield by name and the city of Canton by another way equally offensive to the nature of the subject, and is therefore unconstitutional under sec. 26, art. 2, of the constitution.

*Repealing clause in unconstitutional law—When invalid also—*

- (4). The repealing clause in the act of 1896, amending sec. 2926b, repeals the election laws theretofore existing. As sec. 2926b, as amended, is unconstitutional and void, if the repealing clause therein, would remain in force, there would be no laws to secure fair elections in Ohio. It is not reasonable to assume that such was the intention of the legislature, and the repealing clause of the act is therefore void as well as the rest of the act, and sec. 2926b as it stood before the passage of the amendatory act of 1896, remains therefore in force.

*Control of city election boards outside of city limits unconstitutional—Act of 1898 (93 O. L. 361) unconstitutional—*

- (5). The acts of 1889 (86 O. L., 258,) of 1891, (88 O. L., 468) of 1892, (89 O. L., 429), and that of 1898 (93 O. L., 361) now in force, which provides that in any county having within its territory, a city of the first class and first grade of the second class, except counties containing cities of the first class and fourth grade, the election precincts of the county, not included within the city, shall be held and deemed to be election precincts of the city for the purpose of conducting and supervising elections therein, and the board of elections heretofore established in such cities have direction of elections, is unconstitutional. The classification of cities, allowed by the constitution, can not be extended to counties, and boards of elections in such cities can not exercise any authority over the elections in the counties outside of the city limits.

*Action against members of board distinct from action against board itself.*

- (6). An action against the individual members of a public board

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is a distinct action from one against the board as such, and can not by answer be changed to an action against the board itself.

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Error to the Court of Common Pleas of Cuyahoga county.

CALDWELL, J.

Theodore L. Strimple, Prosecuting Attorney of Cuyahoga county, Ohio, files the petition in this action on the relation of E. P. Wilmot and George P. Kurtz against the four defendants named, in which he avers that the relators reside in Cuyahoga county, and are electors in said county. That the defendants, under the claim that they constitute the board of elections of the city of Cleveland, are usurping and intruding into the office of appointing registrars of elections, and points out specifically by items that they are undertaking to do and perform all the duties of the law pointed out therein for a board of elections to do and perform, under this said claim that they constitute the said board of elections of the city of Cleveland of performing and exercising throughout the county of Cuyahoga, the duties and powers vested by law in the deputy state supervisors in and for said county. This they are assuming to do without legal right, in this, that there is no authority in law for said doings and assumptions, and prays that they be ousted and altogether excluded from said office.

To this petition the defendants file a joint answer in which they show to the court by what warrant they claim that they lawfully constitute the board of elections of the city of Cleveland, and by what authority they exercise and do the things complained of in the petition.

The answer by way of first defense sets out who composed the board of elections on the 31st day of March, 1891, and then names all the persons who have since held positions on that board, giving the time when each one was appointed and by what officer appointed, and it appears that the defendants and all persons appointed since March 31st, 1891,

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were appointed by the mayor of said city, pursuant to and by virtue of an act of the general assembly of the state of Ohio, entitled:

“An act to amend section 2926b, of the Revised Statutes, as amended April 13, 1889, passed April 28, 1890, and found in 87 Ohio Laws, 359, and subsequent amendments thereof.”

The defense shows to the court all the amendments and supplementary sections of the law down to the time of the appointment of the defendants, and avers the qualifications of each of them for the place as prescribed by law, and the necessary facts to show that the mode and manner of appointment complied with the law. That no member of the board since his appointment has done anything to disqualify him to hold his place as pointed out in the law, and that the board is legally organized. This defense avers that since the creation of such a board the state has repeatedly recognized the legality of said board by passing laws pertaining to the same and prescribing the duties of the same.

Wherefore it is claimed that said board of elections is a valid and constitutional board, and that at the time of the commencement of this action these defendants were, and now are, rightfully and lawfully members of and together constitute, the said board, with the right to hold and enjoy their said offices, and with full authority to exercise all the powers and perform all the duties, thereunto belonging.

The second defense of the answer re-affirms the facts of the first defense, and then avers that the defendants and their predecessors in office have at all times since April, 1891, constituted the said board of elections, and have at all times performed all the duties of the law, and that the right of action set up in the petition did not accrue within three years next before the commencement of this action, and then pleads the three years statute of limitations.

The third defense in the answer sets forth the existence

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of certain factions in the republican party; the choice of two committees, one by each faction; and that this action is commenced and prosecuted in the interest of one faction, and hence the court is asked to refuse any affirmative relief to the plaintiffs against the defendants.

To each and all of these defenses a demurrer is filed by the plaintiff. The ground of the demurrer to the first cause of action is, that the statute, under which the defendants were appointed on the board, is unconstitutional.

The second defense is demurred to, because it is claimed this defense shows that this action was commenced within three years from the time that each and all of the defendants were appointed on the board.

There is a demurrer to the third defense, but it is admitted that this is not a good defense as to the demurrer, but may, in connection with the other defenses, serve the purpose of the pleader upon trial, or in case the plaintiff should ask to amend the petition.

Is the law under which the defendants were appointed, unconstitutional?

Section 2926b, as amended in 1896, 92 Ohio Laws, 166, is the one under which the appointment was made. That law provides that "In all such cities"—that means all cities of the first and second class, except Mansfield, and cities of the fourth grade in the first class, a "board of election, to consist of four electors of such city;" shall be appointed by the mayor, and then the law goes on and provides for their appointment and their duties, as amended in 1896, 92 Ohio Laws, under which an appointment was made.

It is claimed that all laws pertaining to elections must be general laws, and that this is not a general law in that it excepts from the provisions of the law Mansfield by name, and Canton in another way equally offensive to the nature of the subject. Article 2, section 26, of the constitution of Ohio, provides that:



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“All laws of a general nature shall have uniform operation throughout the state.”

Has the section in question uniform operation throughout the state?

Under this constitutional provision, a law which applies only to an individual, or to a number of individuals selected out of a class to which they belong, is a special or local law. A general law is one which relates to or binds all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint.

A law is not general in any correct sense of the term, but is special, where it is suspended in one locality where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. This uniformity is in the sense, that the law shall operate the same in all parts of the state under the same circumstances and conditions; such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class. There are reasons why a city needs election regulations that would be useless in country districts. The population in a city is not so stable, the people are more frequently moving. There are men who are without any home or abiding place for any length of time. There are more who are ready at any time to do acts on slight provocation to subvert fair elections. These are reasons sufficient to make it proper and constitutional to have election laws that apply to cities as a class, that do not apply to country districts. So far as this classification is made in the laws of Ohio, they are constitutional. But this distinctive feature existing between cities and rural districts does not exist in cities as between themselves in any such marked degree as would make it a foundation for different legislation upon this subject as to them, and if these laws are laws of a general nature, any

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distinction made in them between cities is unconstitutional. Section 2926b clearly makes this distinction in that it excludes two cities from the general class of all cities, and is, therefore, unconstitutional. *Kelly v. State of Ohio*, 6 Ohio St., 270; *Haskell v. Burlington*, 30 Iowa, 232; *State v. Wilcox*, 45 Mo., 458.

Nor is it possible to exclude from the law the objectionable feature above referred to, for, in whatever form it may stand after such exclusion, it is still a law applying to only a part of the cities of the state. It is, therefore, impossible to drop from the section before referred to, any portion of it and still retain any part that is constitutional.

Is section 2926b special, and are all laws in the state, relating to elections, special laws? This section, among others, provides for the orderly exercise of the constitutional right to vote. While the right to vote, it is claimed, is of a general nature and must have a uniform operation throughout the state, yet the laws merely regulating the exercise of the right, it is contended, are not of a general nature and hence may be adapted to the varying needs of different localities.

The subject of a fair election is one that interests all the people of the state. The people of one county are no more interested in the proper conduct of elections in their county than are the people of an adjoining county, and any unfairness in the election affects every county in the state and every locality in the state. I refer in this, to the election of state officers. The constitutional right of suffrage is common to all who come within the constitutional class, and the opportunity to exercise this right must be, by statutory law, brought reasonably within the reach of all who have the right; and every citizen in the state is interested in who shall be permitted to exercise this right.

It has been held in this state, that a law fixing the salary of county officers in any one county is not a subject of a

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general nature; it is not a law concerning any one except the persons residing in the county; the officers are elected purely within the county, and the salaries are paid entirely by taxation confined to the county, and, hence, how much they shall receive is a matter that is not of interest to any other part of the state.

It has been held that a law, requiring fire escapes to be placed on buildings of a certain height, is a law of a general nature, because there is no sufficient ground on which to distinguish the necessity of such fire escapes in large cities from the necessity existing in smaller places. The same danger substantially that exists in one locality exists in another. There being no ground upon which any proper distinction can be made, and the subject being one of general interest throughout the state, no local law can be constitutional that provides for fire escapes in one locality of the state to the exclusion of others.

Aside from the distinction existing as shown before between cities and rural districts, there is no sufficient ground as to locality in which the law shall operate to make any classification of the laws of elections. As to the interest that all persons have in such laws, it is the same in every part of the state. These facts existing, determine the question as to whether these laws are of a general nature or are local, and that they are of a general nature we think is clear.

This question has been twice noticed by the supreme court of this state. In *Munroe et al. v. Collins*, 17 Ohio St., 665, in the second paragraph of the syllabus, is this language:

“Laws passed professedly to regulate its exercise or prevent its abuse, must be reasonable, uniform and impartial.”

By examining the briefs of counsel in the case, it is seen that the very question before us, was presented to the court in that case; and while there has been some doubt as to

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whether the court did or did not in the opinion determine that by the word "uniform" used in the syllabus, it had reference to the question now under consideration, and meant to determine that all laws pertaining to elections should have a uniform operation and should be general laws, yet there is much in what is said in the opinion, to lead to the conclusion that the court meant to so say; and it is difficult to read the opinion of the court in that case without believing that the court meant to show that all laws pertaining to elections, must be general laws and have a uniform operation. This case is commented upon by Judge Shauck, in State ex rel. Plimmer v. Posten, reported in Weekly Law Bulletin, page 386, of December 19, 1898. Judge Shauck uses this language:

"It does not seem to be doubted that the provision in question operates uniformly and impartially on all political parties and sections of voters. Whatever discrimination it makes is on account of the numbers solely."

From these two opinions, it is probably doing no injustice to the supreme court to say that that court has held that the subject of elections is one of general interest throughout the state, and that all laws pertaining to the same must be of a general nature having uniform operation throughout the state. State v. Butts, 31 Kas., 537-550; the opinion commencing on page 550. The opinion is by Judge Brewer, who at that time was on the supreme bench in the state of Kansas, and is now one of the justices of the United States supreme court. The question for determination before him was, whether a law that pertained to certain cities of the state was a constitutional law and as having a uniform operation throughout the state; and that was the question that he determined, and he determined that cities might be classified under the constitution, and that any law that pertained to all the members of a class, made where a proper distinction exists for making classes, is a

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general law and of uniform operation, and that the law under consideration was of that nature. Had Judge Brewer believed that it made no difference whether the law was a general law or local law, or that a local law was proper, he could have much more easily pronounced his opinion by saying that "under the constitution, considering the subject of elections, it makes no difference whether the law is general or local."

We, therefore, hold that the section in question is local in its operation and its application, not having a uniform operation, but does by its terms exclude two cities of the state from its operation and, therefore, it is unconstitutional and affords the defendants no warrant of law for usurping the office they hold.

It is contended, however, that, if this law is unconstitutional and void, it can have no effect whatever, and that the clause attached to it, by which the same section in the law of 1890 was repealed, can have no effect, and that the section in the law of 1890 is in full force and effect, and affords sufficient warrant of law, for the holding of the office.

The question presented by this claim of counsel is, as to whether, when a law is declared unconstitutional, the clause therein repealing a former law falls with the unconstitutional part of the law or remains good, leaving all acts and things done under the unconstitutional law without any support from the law that was repealed.

There is no doubt that an act may be constitutional in part, and in part void. If the unconstitutional parts are essential to the constitutional, all must fail, and if the parts are so mutually related as to make it evident that the legislature intended them to constitute one, so that if all could not be carried into effect, none would have received the legislative sanction, the case is within the same rule; but this rule must be taken with the limitation that the parts so held respectively constitutional and unconstitutional must

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be wholly independent of each other so that the one intent may exist as to one, and a separate intent as to the other.

The election laws, as found upon our statute books, have been passed by reason of the necessity that existed in our state. That necessity was to secure fair elections. The same necessity has been found to exist in nearly every state of the union. It is, therefore, not reasonable to conclude that the state legislature meant to repeal all laws upon this subject and leave the state entirely without law regulating elections in the state. This being true there was no intent to repeal the law of 1890 by the law of 1896, for any other purpose than to give effect and operation to the latter law. This being true, and the law of 1896 being unconstitutional, the legislature must have intended that if that act should prove to be unconstitutional, then the law of 1890 should remain in full force and effect. This intent existed, and the purpose of putting in the repealing clause being as above stated, it follows that the repealing clause falls within the law itself, and the act of 1890 remains and has remained up to this time as the law governing elections. This is not without authority.

Bishop on Written Law, sec. 34; Sutherland on Statutory Construction, sec. 175; State v. Keyser, 14 Nevada, 202; Sullivan v. Adams, 3rd Gray, 476; State v. Bland, 121 Indiana, 514; In re Rafferty, 1 Wash., (State of Washington) 389; Tims v. State, 26 Ala., 165; Childs v. Shower, 18 Iowa, 261; In re Petty, 22 Kansas, 489; People v. Flemming, 7 Col., 230; Randolph v. Builders & Painters Supply Co., 106 Ala., 501.

This latter case is authority to the point that where acts are done under and with special reference to the unconstitutional law, these acts may be justified and enforced under the previous law repealed by the unconstitutional law.

The defendants cannot, therefore, be ousted from their office notwithstanding the law of 1896 is unconstitutional,

*[Illegible signature]*

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unless the law of 1890 is also unconstitutional. We have examined this law carefully and the authorities bearing upon the different phases of the law. And we hold that that law is constitutional, and, so far as the board of elections are performing the duties of the board pertaining to the city of Cleveland, constitutes warrant of law for such acts.

In 1889, (86 O. L., 258, sec. 2926 and supplementary sections,) the authority of the board of elections in a county having within its territory a city of the first grade and first class, was extended to and over all elections held in the county, and providing that the secretary and clerk should be electors of the county and not of the city merely. This act applied to Hamilton county alone, it being the only county that had a city of the first grade and first class.

In 1891, 88 O. L., 468, a law was enacted on April 30, 1891, providing that in any county having within its territory a city of the first class, the board of elections heretofore established in such city shall be the county board of elections, and all the privileges, duties and penalties of sec. 2926b and the supplementary sections shall apply to all elections in such counties. And in 1892, 89 O. L., 429, the act was again amended; and section 1 provides that in any county having within its territory a city of the first class, the election precincts of the county, not included within the city, should be held and deemed to be election precincts of the city for the purpose of conducting elections therein, and the board of elections heretofore established in such city, shall have direction of elections in such precincts and throughout such county, and that all the provisions of sections 2926b and supplementary sections shall apply. This section is marked 2926 w-1, of the Revised Statutes.

In 1898, 93 O. L., 361, sec. 1, provides that in any county having within its territory, a city of the first class and first grade of the second class, except counties containing cities of the first class and fourth grade, the elec-

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tion precincts of the county, not included within the city, shall be held and deemed to be election precincts of the city for the purpose of conducting and supervising elections therein, and the board of elections heretofore established in such cities have direction of elections.

There are features of this last statute that fall clearly within what I have already said in regard to 2926b, and I will not repeat them.

These laws constitute the authority of the board of elections of the city of Cleveland for extending its authority over the elections of the county outside of the city. These laws are called in question as to their constitutionality, and they may be considered together, or if one of them is unconstitutional they are all unconstitutional; and if there is no authority in one, there can be no authority in any of them. These laws undertake to make and do make a distinction between the rural parts of a county containing a city of the class named in the law, and the rural parts of a county not containing such a city. Any reason for this distinction in the law is not easily comprehended. We know none, nor can we think of any reason why one county should be or can be distinguished from another, under the election laws.

It is clear from the decisions of the supreme court of the state that the classification allowed by the laws of the state as to municipalities, can not be extended to counties; and, upon a law of a general nature, whatever distinction may exist as to counties, the court will not sanction any classification of them in such a law making the parts of such counties outside of the cities named—or, to be more specific, making that part of Cuyahoga county lying outside of the city of Cleveland a part of the city so far as elections are concerned. This is making a classification of such part of Cuyahoga county different from the law applied to other counties in the state, and this is done without any grounds for such distinction, and without any authority of law of dis-



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Stat. ex rel. Wilmot et al. v. Buckley et al.

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tinguishing counties under a general law or excepting any county from the operation of a general law. This being true, it follows that the board of elections in this county has no warrant of law for usurping any authority over the election precincts of the county lying and being outside of the city. If a final judgment is entered on this hearing, a decree may be taken in this case ousting the board of elections from such office so far as the precincts outside of the city are concerned.

The second defense is the three-years' statute of limitations. It is not important in the view we have taken of the law, that we should say anything upon this subject. I will merely say this: That it is clear no cause of action arose until the passage of the law of 1896. There was until that time no unlawful usurpation of the office; and that unlawful usurpation arose from the passage of the law of 1896 and the laws extending the authority of the law over the entire county.

These laws were passed at such a time that the cause of action set up in the petition in this case, arose within the three years preceding the filing of the petition. This being true, the statute of limitations has no place in this case.

An effort is made in pleading this defense in the answer to show that this statute of limitations must be held to apply to the board as such, and not to the individuals thereof. The action is brought against the individuals alone, and not the board, and properly so. The defendants as individuals file a joint answer, and not as a board. This being true, the statute of limitations, so far as it can apply to this action at all, can apply only to the times of appointment of the individual members of the board. *State ex rel. v. Robinson*, 7 C. C., 152.

In that case the Cincinnati circuit court held that where the purchase makes a cause of action against a board of ed-

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ucation and likewise against the directors composing that board, and the judgment is asked against each, that it is a misjoinder, there being two causes of action distinct and separate, and they must be so stated and so dealt with.

If that is true, and this is a cause of action against these members of the board of elections, it can not by the answer be changed into a cause of action against the board itself.

The demurrer to the second cause of action is sustained.

What I have said as to the judgment to be entered herein, has been said upon the supposition that the defendants will not desire to answer over. Judgment will be made accordingly.

The demurrer as to the second defense, the statute of limitations, will be sustained.

MARVIN, J. I have not felt so persuaded that the statute, section 2926b, as amended in 1896, is a law of a general nature which must have a uniform operation throughout the state, such as to fully justify myself in saying that it is unconstitutional. I do not care to take up time. It is quite likely by brethren may be right.

CALDWELL, J. I have made the following entry in the case of the State ex rel. Wilmot and Kurtz:

"December 23, 1898, demurrers to the second and third defenses in the answer sustained, and the demurrer to the first defense in the answer is overruled; and the plaintiff excepts to the overruling of the demurrer to the first defense; and the defendant excepts to the sustaining of the demurrers to the second and third defenses in the answer."

*C. E. Pennewell, F. J. Wing, for Plaintiff.*

*M. G. Norton, Geo. Phillips, for Defendant.*

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The Kenton Gas & Electric Co. v. Dorney et al.

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(Third Circuit—Hancock Co., O., Circuit Court—May Term, 1898.)

Before Day, Price and Norris, JJ.

THE KENTON GAS AND ELECTRIC COMPANY. v. GEORGE  
S. DORNEY et al.

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*Gas and Oil Lease construed—Forfeiture—*

Where the owner of real estate made a lease, granting the underlying gas and oil, with the right to drill wells in order to procure said products, which, if obtained, were to be divided between the lessor and lessee in certain stipulated ratios, and where the lease contained the provision that if no well is completed within one year from the date of the lease, then the grant shall be null and void, unless the lessee shall pay to the lessor, a certain amount of money agreed upon, for each year thereafter that such completion is delayed, and where the lessee did not complete a well within the year from the date of the lease and did not pay or tender the amount of money agreed upon until after the expiration of the year next after the date of the lease, which was then refused by the lessor, held:

1st. That the lease became forfeited by virtue of its own provisions and is void, and an election on the part of the lessor to terminate it, is not required.

*Lessor's option of forfeiture—What will amount to exercise—*

2nd. That in such case, the making of another or second lease of the same real estate, for the same purposes, after the expiration of the year stated in the above provision, to a third party, would be evidence of an exercise of an option to forfeit the first lease and of an election to terminate it.

*Life tenant can not grant oil and gas lease—*

3d. That a tenant for life has no right to operate for oil or gas, on the premises in which such estate is held, or to make an oil or gas lease thereon, when operations for oil or gas were not commenced before the life estate accrued.

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Appeal from the Common Pleas Court of Hancock county.  
DAY, J.

The plaintiff, a duly organized corporation, claims a leasehold estate with the right to drill for and produce oil and gas on the 70 acre farm of W. L. Decker,

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in Jackson township, Hancock county. Plaintiff's lease was executed on August 17, 1896. The action is brought against Dorney & Harris to enjoin them from entering upon the said 70 acres and drilling for, or producing oil or gas thereon, which it is averred they are threatening to and will do unless restrained; and the prayer of the petition is for a perpetual injunction and the cancellation of two leases, for the same premises, given, one in 1893, by W. L. Decker, and one in 1897, by Mrs. Anna Altman, to the defendants. Defendants Dorney & Harris assert the validity of their two leases and the invalidity of the plaintiff's lease, and ask to have their title quieted as against plaintiff, and for costs.

There is no dispute as to the material and controlling facts. The facts are: Anna Altman has an estate for life in the 70 acres, which she has not formally conveyed away. She, however, put her son W. L. Decker, who owns the fee subject to said life estate, in possession of the 70 acres to occupy and use as his home, and he has so used and occupied the same for more than ten years, and his mother has lived in his family and has been supported by him. The son has paid the taxes for ten or more years. On January 28, 1893, the son made a lease to Dorney & Harris. This lease contains the following provision: "If no well is completed within one year from this date—January 28, 1893—then this grant shall become null and void, unless second party shall pay to the first party seventy dollars for each year thereafter such completion is delayed." No well was completed within one year, or at all, and no rental was paid at the expiration of one year, or at all; but in May, 1897, Dorney & Harris tendered \$210 in payment of rent, which was refused by Decker. On August 17, 1896, Decker made and delivered a lease to the Kenton Gas and Electric Company, which company has paid rental, as per contract of lease, up to November, 1898. Both of these

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leases were valid at their execution, were sufficient in form, and were properly acknowledged and recorded. Mrs. Altman made a lease of the same 70 acres for oil and gas purposes on May 27, 1897, and received \$90.00 of the \$100.00 rental agreed to be paid her; but the next day paid the \$90.00 back to Mr. Harris, and demanded her deed of lease from him, which demand Harris declined to accede to. This last lease was also sufficient in form, and was properly acknowledged and recorded. Each of the leases were for a term of five years and so long as oil or gas was found in paying quantities. Dorney & Harris hauled some material for a derrick on to the premises in May, 1897, and were intending to enter and drill a well, when they were prevented by the temporary injunction allowed at the commencement of this case.

Both parties claim the right to possess and operate the 70 acres; plaintiff, by virtue of the lease of 1896, and defendants, in virtue of the prior lease of 1893, and the lease from the life tenant, made in 1897; and the question pressing for answer is, which claimant is entitled—which lease is valid and subsisting, if either of them is. If the lease of 1893 is still subsisting and valid, it is manifest that that of 1896 is invalid and ineffectual. If, however, the lease of 1893 has become forfeit and void from any cause, the lease of 1896, so far as the interest of the remainderman or reversioner is concerned, is valid and effectual, and gives the plaintiff company full right, as against all the world save and except the life-tenant, Mrs. Altman; and it is believed that the most she could do in the premises, would be to prevent any development under the lease without her consent. So the important question first pressing for solution is: Is the lease of 1893 still in force, or has it for any cause become forfeit by its own terms?

The provision for forfeiture, in case of non-completion of a well, and non-payment of rent, is plain and unambiguous, and cannot well be misunderstood.

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“If no well is completed within one year, then this grant shall become null and void, unless second party shall pay first party \$70.00 for each year thereafter, such completion is delayed.”

It is certain no well was ever drilled; nor was any rental paid for delay. One or the other of these conditions must have been performed to save the grant from becoming null and void. Either the completion of a well, or the payment of rent is essential to save the grant; and neither has occurred. Defendants seem to believe, that in some mysterious way the tender and offer to pay rent, in 1897, in May, more than three years after the lease became void for non-completion of a well by its own terms, had the effect to open up the defaulted payment, and restore defendants to their rights under the lease, precisely as they were at the expiration of the year allowed for the completion of a well, when they had the right to prolong the life of the lease by the payment of rent. We think this view cannot be entertained or considered as in any way justified by the wording of the lease. The provision is, that the term of the lease can be continued, or rather, the grant saved from becoming void, by the payment of money. Something active must be done to save a forfeiture. Payment must be made to have a saving effect. The provision is not a negative one, but is distinctly affirmative, and no construction, even the most strained, will allow the defendants to save their rights under the lease, on credit. Money down—Cash in advance and “no credit here” seems to be the rule established by the contract under consideration. The affirmative, active things required by the stipulations of the lease, to save it from becoming null and void, were not done or attempted; and the conclusion seems imperative, that the lease became void by the force of its own provisions. The provision for forfeiture, in this case, is mandatory, and does not merely confer on the lessor an option to declare a forfeiture for his

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own protection, but provides for forfeiture absolutely, unless the leasee does something to prevent it. But if that were not so, and, as has been held by the supreme court in one case, the provision of forfeiture is for the benefit of the lessor and gave him an option or election to declare a forfeiture, or not, as he might deem best; and requiring an election, on his part, to terminate the grant; still we are of opinion the term provided by the lease is ended. The making of the lease to plaintiff in 1896, must be regarded as the exercise of the option and an election, by Decker, to terminate the lease of 1893. On either ground, or upon both, we hold the lease to Dorney & Harris, made in 1893, has become void and of no effect.

We are also of opinion that the lease executed by the life tenant, in 1897, was ineffectual to vest in defendants any interest in the 70 acres, by reason of want of power in the life tenant to convey such interest. It is well settled that a tenant for life, in possession of real estate, has no right or power to defeat the title or injuriously affect the interest of the remainderman, by alienating or disposing of some portion of the real estate; or even by using it in such way as to injure the reversionary interest and depreciate its value. The commission of waste forfeits the life estate to the remainderman. The supreme court holds, that petroleum, oil and gas in their place in land, is part of the realty, and so remains until it is produced, when its character changes and it becomes chattle property. In this respect, petroleum is similar to standing and growing timber. While standing and growing, it is real estate, but when severed, it becomes personal property. A life tenant would have no more right to contract away the mineral part of the land, than to dispose of the standing and growing timber. The doing of either would amount to waste, and would have the effect to forfeit the life estate to the reversioner. The old lady took one step toward the commission of waste, but

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retraced and withdrew before consummating it. To enforce her contract would be to enforce a wrong, and would have the effect to deprive her of her only means of support in the sunset of her life; and this the court declines to do. The defendants Dorney & Harris acquired no rights — no legal rights—under the lease from the old lady; and it seems to us certain the lease of 1893 became null and void, by its own terms, in 1894, and certainly so in 1896; and from any view we are able to take, Dorney & Harris have nothing of interest in the 70 acres in controversy. Plaintiff has some interest—has a valid and subsisting contract of lease from the remainderman, that entitles it to maintain this action, and, with the consent of the life tenant, may entitle it to operate the land for oil and gas.

There will be a finding for plaintiff, and the injunction will be made perpetual, with costs to the defendants.

*Frank C. Daugherty and Jno. E. Betts, for Plaintiff.*

*Blackford and Blackford, for Defendants.*

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(Eighth Circuit—Cuyahoga Co., O. Circuit Court—Jan. Term 1899.)

Before Caldwell and Marvin, JJ.

(Hale, J. absent.)

In the Matter of the Proceedings against FRANK E. DELLEN-  
BAUGH and VERNON H. BURKE.

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*Admission to bar is for life—Attorney cannot withdraw from bar by entering other business—*

- (1.) An admission to the practice of the law is for life unless the attorney is sooner removed, and when he leaves the practice and goes into another business he may at any time return to the practice again, and therefore, although he may have attempted to withdraw himself entirely from the profession, yet the courts have a right to deal with him as a member of the bar, and to disbar him.

*Member of Bar, although at the time a judge of the Common Pleas may be disbarred—*

- (2). The court has jurisdiction to try an attorney at law although



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at the time of such trial and of such proceedings he may hold the office of common pleas judge, and may not be authorized at that time to practice his profession.

*Jurisdiction of courts in disbarment cases—*

- (3). Although the present statute places the authority to admit persons to the bar exclusively in the supreme court, it does not deprive the circuit and common pleas courts of the jurisdiction in disbarment proceedings conferred by sec. 563 R.S.

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PROCEEDINGS TO DISBAR, ETC.

CALDWELL, J.

We reached a conclusion in the case of the disbarment proceedings against Judge Dellenbaugh, last Friday, and expected to announce it Saturday morning, but Judge Hale went home unwell Friday. We expected him to announce the opinion; he has requested me to announce simply our conclusions in the matter this morning.

Charges in this matter have been filed against Judge Dellenbaugh and against Vernon H. Burke, and both attorneys have filed demurrers to the charges.

The demurrer has two branches to it, and we have heard the demurrer so far as Judge Dellenbaugh's case is concerned, and the other demurrer is not heard by reason of the sickness of Mr. Foran, who is unable to appear in court.

In the Judge Dellenbaugh case the demurrer, first, aims at the jurisdiction of the court to hear and try the matters presented in the complaint filed by the attorneys appointed by this court; and, in the second place, against the complaint as it does not set up facts sufficient to constitute an offense under the statute.

In the first place, it is contended that this court has no jurisdiction to hear and determine this case. One ground of argument on which this point is sought to be reached, is that the supreme court now alone has jurisdiction to admit to the bar and, that being true, no court but the supreme court has power to remove an attorney from the bar. That is hinted at, though not urged to any very great extent, in

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the last argument that was made in behalf of the respondent.

The statute places the jurisdiction in such proceedings within either the supreme court, or the circuit court, or the court of common pleas, and, although the statute now confines the admission of attorneys to the supreme court and places the matter entirely within the jurisdiction of the supreme court, yet we do not think it takes away the jurisdiction in disbarment cases given by section 563 of the Revised Statutes.

The second point is that as to whether Judge Dellenbaugh is, within the meaning of this statute, an attorney practicing before this court, as contemplated in the statute. That leads to an examination of the statute (sec. 563):

“The Supreme Court, or the Circuit Court, or the Common Pleas Court may suspend or remove any attorney at law from office, for either of the following causes: \* \* \*.”

That part of this statute confers the jurisdiction, and the causes are named; and then the statute proceeds, after bestowing the jurisdiction, to determine in what manner the proceedings shall take place and the mode of procedure prescribed, and this is it:

“The judges of such courts are required to cause proceedings to be instituted against any attorney at law when it in any manner comes to the knowledge of any judge in whose court such attorney practices, that such attorney is probably guilty of any of the causes of suspension or removal.”

That prescribes the manner and the part of the state in whose court such attorney practices; and, we are inclined to think and so announce, prescribes the venue in which the proceedings should take place, and had no other purpose than that in the statute.

It is said, in the next place, that the meaning of the second and third causes for proceedings as stated in this statute, are of such a nature that the information filed in this

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case brings it under the second and not under the third subdivision or ground stated in the statute, for removing an attorney, and, as the complaint does not pretend to place anything under the second, that, therefore, the complaint is not good.

The causes for which a removal may be made, are: misconduct in office, conviction of crime involving moral turpitude, or unprofessional conduct involving moral turpitude.

It is claimed that the intention of the statute is that these three causes are to be considered as separate and distinct causes, and that no case can fall under both or two or more causes at the same time; that if it is misconduct in office, it can be neither of the others; that if it is conviction of crime involving moral turpitude, it can be neither of the others; or if it is unprofessional conduct involving moral turpitude, then it can be neither of the others; and that this complaint makes complaint only under the first and third causes, and not under the second, and at the same time the specifications set up a crime committed in the conduct of the attorney and, that being true, that it cannot fall under the second, and does not fall under the first, or third.

We cannot agree, in our conclusion, and we do not agree, with the attorney holding the ground that I have stated, that a conviction of crime involving moral turpitude, or unprofessional conduct involving moral turpitude, are two distinct grounds. In one, there has been a conviction; in the other, unprofessional conduct may be conduct that involves a crime although the party has not been convicted of that crime.

The authorities are greatly at variance as to whether the party can be convicted or can be removed for unprofessional conduct involving moral turpitude where that moral turpitude is a crime, without being first convicted of that crime. The authorities are somewhat at variance. The prevailing

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authorities seem to be that if that moral turpitude pertains to some act done while acting as attorney, the attorney may be proceeded against without being first convicted before a jury; but, if it is something lying outside of the attorney's profession or duties as attorney, there is much more authority going to show that he ought first to be convicted.

But we think that the proceedings may be had, although that it might be, and may be possibly, that there is a crime charged in these specifications; yet it can be sustained under the third.

But the main proposition in the case, which has been argued to a very great extent by the attorneys on both sides, is that Judge Dellenbaugh is acting now as a judge on the common pleas bench, and that the statute forbids him to practice at his profession while he is thus acting on the common pleas bench. There is an exception to his being forbidden to practice, in that he can finish any work that he may have commenced in the federal courts; but that he cannot practice in the state courts—the statute prohibits that entirely. And it is claimed that he, not being a practicing attorney, being removed by force of that statute from being a practicing attorney while he is a judge, is not filling the office of an attorney during that time, and that being so, he cannot be proceeded against. And then it is urged also, that the constitution of the state provides a punishment, a sufficient punishment against one who is acting as judge, who, in any way, fails to perform the duties of that office faithfully or honestly, that he may be removed by impeachment; and that the court cannot proceed in these proceedings without infringing on the duties and rights of that body; that is, to try him by way of impeachment.

Now we have examined a great deal of authority upon these two questions, and there is not much that is fairly in point.

We have examined a case in 6th Dowling Practice Cases,

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In Re Dellenbaugh and Burke.

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page 310. In that case, an attorney undertook to entirely desert the profession of law and go into other business; and, when proceedings were commenced against him, he pleaded as a defense that he was no longer a lawyer; that he was no longer practicing the law, and that the court, therefore, had no jurisdiction to try him. But the court ruled in that case, that an admission to the practice of the law is one for life unless the attorney is sooner removed, and that while he leaves the practice and goes into other business, he may at any time return to that business again; that is, to the practice of the law, and that his name and his right remains in the practice of the law, and that although he has attempted to withdraw himself entirely from the profession and from the practice, yet the court has a right to deal with him as a member of the bar and to disbar him.

There is a case in the 39 Atlantic, page 1087; page 1090 is the place where the question is discussed. That was a case decided just about one year ago by the supreme court of Connecticut. Proceedings were commenced to disbar a prosecuting attorney, for certain acts and certain conduct while acting as prosecuting attorney; and the defense was made, in that case, that it was not within the power of the court to remove him from his office as prosecuting attorney,—that that belonged to the legislature or to another authority entirely; that he could not be impeached by the court, and that taking proceedings against him as an attorney, in his office as prosecuting attorney, if that removed him from that office of an attorney, it removed him from office as prosecuting attorney, for if he was not an attorney at law, he could not practice before any court, and hence he could not exercise the duties of his office as prosecuting attorney. But the supreme court of Connecticut, in that case, held that that was no bar and no reason why he should not be proceeded against as an attorney of the bar, and removed, although the effect of such removal would be to re-

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**In Re Dellenbaugh and Burke.**

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move him from office as effectually as though he had been impeached for misconduct in office.

Then, the cases are numerous and we have examined many of them, where an attorney has no exemption—no difference what office he may hold, whether that of Judge or any other office—from all the liabilities of any other individual of the community to any civil action or any criminal action; that he has no exemption whatever, by reason of any other office he may hold, why he should not be dealt with in his office as attorney at the bar; and we find this, that in every field of life, as to business matters, as to all actions against such person, any court, whether of a civil or criminal nature, that the fact that he holds the office of judge is no reason why he may not be dealt with the same as any other individual of the community. The fact of proceedings to disbar one who holds another office or the office of a judge at the same time of the disbarment proceedings, has no effect upon his other office whatever; it is not necessary that the party should be an attorney in order to hold the office of judge in this state. So that the case here is not as strong a case against proceedings, as the case I refer to in Connecticut where the proceedings to disbar would be proceedings to remove the attorney from his office as prosecuting attorney.

After examining this matter with a great deal of care we come to the conclusion that the court has jurisdiction in this matter, to try an attorney at law although, at the time of such trial and the time of such proceedings, that attorney may be holding the office of common pleas judge, and may not be authorized at that time to practice his profession.

It is claimed, in the next place, that the charges, the specifications 1 and 2, set up misconduct on the part of Judge Dellenbaugh that amounts to misconduct in his office as judge and not to misconduct as to his office of attorney.

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In Re Dellenbaugh and Burke.

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We have read those specifications very carefully, as they were read many times during the trial, and the specifications evidently aim to charge that in all that he did in those specifications that I have mentioned, it was done while he was prosecuting his office as attorney, and not that of judge. Of course, when we reach a further point in this case, it may be necessary to determine very accurately just how far one who acts as judge—how far his acts amount to a performance of duties in that particular office; but we have examined a great many authorities already upon this subject, and nearly all of them hold this: That where a judge undertakes to exercise the duties of a judge clearly against a provision of the statute of the state that he shall not exercise, where by the statute of the state he has no right to exercise such duties, that his acts are entirely void. I believe the rule of common law was that those acts were not void, but voidable; but where the acts are prohibited by statute, the authorities are quite numerous that those acts are entirely void, and that a judge who thus acts is not exempt from civil action, nor even from criminal action by reason of those acts—he has acted without authority; hence he has acted simply as an individual, and any damage that he has done anyone by reason of such acts is no shield to him whatever when sued to recover damages from him on account of such action. There is a class of cases, so far as the law stands, before us now; it is simply this: That he undertook to do certain acts in a matter wherein he himself was an attorney at that time, and it charges that he did that purely and simply to further his desires and wishes and purposes as an attorney, and not as a judge, and he did those acts, so far as it appears now, directly in the face of the statute or the common law doctrine that has prevailed in the state and is sanctioned by statute in nearly all the states. That being true, so far as the matter now stands, it would be bringing these acts plainly within the rule of a

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In Re Dellenbaugh and Burke.

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clear violation of a plain duty, and be without jurisdiction. There is a line of cases that we have examined, that go upon this theory, that if the question is a close one, and if the judge has exercised an honest judgment upon the matter, and has apparently been fair, but determined that he could sit in the matter, and has exercised his authority in his judicial office in that particular matter, then he will be exempt; some courts going so far as to hold that his action will be only voidable, and not void. But how far this matter may appear upon the evidence, or must appear from the answer and the evidence as it now stands, we think that objection is not well taken. So that we think that the specifications named are good as against this demurrer.

The last point that I shall notice, is this: That the specifications, if true as alleged, do not constitute such an offense under section 563, of the Revised Statutes, as would warrant a court in removing an attorney from his office as attorney. I will not discuss that at all, but will say that if these specifications are made good by proof, we can see no reason why it does not constitute an offense that should remove an attorney from his office, or suspend him,—one or the other.

And we overrule this demurrer in the Dellenbaugh case, and will note an exception.

JUDGE INGERSOLL: Your Honor, I ask the court to separately docket each case—to have the docket show each case separately if the other side has no objection.

THE COURT: I suppose it ought to be done.

MR. HADDEN: We concur, I think. We see no objection to it.

*Messrs. White, Sanders, Blandin, Hills and Hadden,*  
for Prosecution.

*Messrs. Ingersoll, Boynton and Hogsett,* for Respondent.

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Guckenberger v. Dexter et al.

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(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1898.)

Before Cox, Smith and Swing, JJ.

GEORGE GUCKENBERGER, a taxpayer, v. JULIUS DEXTER et al.\*

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*Refunding bonded indebtedness of Cincinnati—Authority of Sinking Fund Commissioners and of Trustees of Cin. So. Railroad—*

- (1). Sec. 2729a, R. S., authorizes the sinking fund commissioners of Cincinnati to refund the bonded indebtedness of the city at a lower rate of interest. The act of 1898, (93 O. L., 676) authorizes the trustees of the Cincinnati Southern Railroad by proper indorsement on the bonds and coupons of the city issued for the construction of that railroad to extend the time of payment thereof at a lower rate of interest. Held, that while the latter law does not use the word "refund," it provides a scheme by which the railway trustees may virtually refund these bonds.

*Same—Contract for refunding indebtedness of Cincinnati must be performable within reasonable time—*

- (2). While the act of 1898 is the last expression of the legislature on the subject of refunding these bonds, it does not in terms repeal sec. 2729a, R. S., and the court holds that there is not necessarily any conflict between these laws, and that they may both stand, with each board having a right to refund these bonds, with the limitation that whichever board acts first and refunds the bonds, exhausts the power and thus deprives the other of the right to perform the same act. But any contract made by either board looking to the refunding of these bonds must have a reasonable operation with a view to respecting the rights of either to perform the same act, and therefore any contract of this kind to be binding, must not in its nature be prospective to an unreasonable time as to its fulfillment, and a contract entered into by the sinking fund commissioners to refund the bonded indebtedness of the city which is not to be performed within three, four or five years is held to be unreasonable and void.

*Same—Refunding by sale of bonds—Advertisement and competition required—*

- (3). If the refunding of the bonded indebtedness of the city by the sinking fund commissioners under sec. 2729a, is to be accomplished by selling bonds of the city, sec. 2709, R. S., would apply which requires the sale to be to the highest and best

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\*(For decision in Common Pleas in this case, by Spiegel, J., see 5 Nisi Prius, 429.)

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bidder after the advertisement prescribed, and a contract for that purpose entered into by the commissioners without advertisement and without competition and not to the best bidder is void.

*Same—Increase of amount of indebtedness not permissible.*

- (4). Sec. 2729a, R. S., providing that the aggregate amount of bonds issued by the trustees in refunding the debt of the city shall not exceed twenty-six million dollars, a refunding contract therefore which increases the bonded indebtedness by three million dollars beyond the aggregate amount of twenty-six million dollars, although at a lower rate of interest, is void.
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Error to the Court of Common Pleas of Hamilton county.  
SWING, J.

This is an action to restrain the defendants from performing a certain contract theretofore made by said defendant, trustees of the sinking fund of the city of Cincinnati, with Roberts & Company, bankers of New York city, concerning the refunding of \$15,610,000 of the bonded debt of said city.

This contract is as follows:

“Agreement made this 15th day of June, 1898, between Roberts and Company, a corporation organized under the laws of the state of New York, and doing business in the city of New York in said state (hereinafter called the bankers), parties of the first part, and the trustees of the sinking fund of the city of Cincinnati, in the state of Ohio, (hereinafter called the trustees) parties of the second part:

“Whereas, there are now outstanding approximately the following amounts of the following issues of bonds of the city of Cincinnati (hereinafter called outstanding bonds), that is to say,

“Cincinnati Southern R. R. 7% bonds maturing in 1902, say	\$494,000
“Cincinnati Southern R. R. 7 3-10% bonds maturing in 1902, say	7,644,00
“Cincinnati Southern R. R. 6% bonds maturing in 1906, say	2,890,000
“Cincinnati Southern R. R. 7 3-10% bonds maturing in 1906, say	1,860,000

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“Cincinnati Southern R. R. 7% bonds maturing in 1908, say	835,000
“Cincinnati Southern R. R. 6% bonds maturing in 1909, say	895,000
“Founding Floating Debt, 7% bonds maturing, in 1904 say	992,000

“Total amount outstanding estimated at \$15,610,000

“And, Whereas, the trustees, by virtue of the powers now vested in them, and the legislation hereafter to be had amending or supplementing the same, propose to refund the outstanding balances of the issues aforesaid, whatever the same may be, in Cincinnati consolidated sinking fund bonds (hereafter called refunding bonds), of the character described in sections 2729a and 2729b of the Revised Statutes of Ohio. or authorized by subsequent legislation; and

“Whereas, the bankers have proposed to purchase a sufficient number of said refunding bonds to refund said outstanding bonds upon the terms hereinafter stated:

“Now, therefore, this agreement witnesseth, that the trustees agree to sell and deliver to the bankers, and the bankers agree to buy and accept from the trustees, so many of the refunding bonds hereinafter described as can be lawfully issued and shall be necessary to be sold to provide for the refunding of the several issues of bonds above described, subject to the following reservations and conditions:

“1. All the refunding bonds to be tendered to and purchased by the bankers under this agreement shall be regularly and legally issued; shall bear date the 1st day of January or of July of the year in which they are so purchased by the bankers; shall be payable in the city and state of New York; shall bear interest at the rate of three and one-half per centum per annum, payable semi annually; and shall become due fifty years, and be redeemable thirty years from date. If coupon bonds, they shall be of the denominations of one hundred dollars, five hundred dollars, and one thousand dollars in such lots or portions as the bankers may designate. If registered bonds, they shall be of the denomination of one thousand dollars, or such multiple thereof and in such lots or portions as the bankers may design-

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nate. The bankers may require that each delivery be made in coupon bonds or in registered bonds, or partly in coupon bonds and partly in registered bonds, in such proportions as they may designate; and all such coupon bonds shall be exchangeable for registered bonds at the demand of the holder thereof, if tendered in sums of one thousand dollars or a multiple thereof.

"2. For the refunding bonds thus to be purchased by the bankers, they shall make payment at the time of the delivery in the manner hereinafter provided, either in cash, or in outstanding bonds of the issues to be refunded. If said payment be in cash, it shall be the par value of the bonds thus paid for, with accrued interest until the time of such payment. If such payment be in outstanding bonds, the same shall be accepted by the trustees at prices which would yield or represent to the city of Cincinnati in annual return of three and one-half per centum per annum upon the cost of said bonds to said city, said price and said annual return to be figured in accordance with 'Price's Stock Values', the number of days, months and years in such computation to be the unexpired term between the date of the delivery of said outstanding bonds by the bankers to the trustees and the date of the maturity thereof. As it is probable that the larger part of the outstanding bonds delivered by the bankers to the trustees will be delivered by them before maturity, and therefore, at a premium over and above the par value of said bonds, such premium may, at the option of the trustees, be paid in cash or in refunding bonds, or partly in each.

"3. The bankers may only purchase refunding bonds for cash within ninety days next before the maturity of each of the issues first above mentioned, and then only to the amount of outstanding bonds maturing within said ninety days. Unless enough bonds of any issue to be refunded have been delivered to the trustees prior to ninety days before the maturity of such issue to satisfy the trustees that means of payment of the outstanding bonds of such issue will be provided by the bankers in cash on or before maturity, the trustees shall be at liberty to take such proceeding to provide the required money as to them may seem necessary.

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“All outstanding bonds above described as and when acquired by the bankers shall be by them promptly tendered to the trustees. Upon such tender by the bankers to the trustees of any of the outstanding bonds more than ninety days before the maturity of the bonds so tendered, the trustees shall accept the bonds so tendered, and pay the par value thereof, and the premium, if any, thereon, with refunding bonds and cash as above provided.

“If the bankers shall fail to deliver said outstanding bonds under this contract to the trustees in amounts and at times as follows, viz: not less than five hundred thousand dollars on or before the first day of January, 1899; not less than one million dollars, on or before the first day of July, 1899, not less than one million, five hundred thousand dollars on or before the first day of January, 1900; not less than two million dollars on or before the first day of July, 1900; not less than two million five hundred thousand dollars on or before the first day of January, 1901; not less than three million dollars on or before the first day of July, 1901, and not less than three million, five hundred thousand dollars on or before the first day of January, 1902, then, and upon such failure, and at any time while the same continues, and notwithstanding a prior failure of similar nature may have been waived, the trustees may at their option, terminate this contract by giving thirty days written notice to the bankers of their election so to do; and such termination shall absolutely discharge and put an end to this agreement and the rights and liabilities of all parties and their assigns thereunder, and shall release the bankers and their assigns from all damages and claims for damages whatsoever, upon or arising out of this contract or any part thereof.

“4. In case the state of Ohio shall, on or before the first day of July, 1900, enact legislation authorizing the trustees to issue refunding bonds of said city of Cincinnati maturing fifty years after date without privilege of redemption at an earlier period, and payable both as to principal and interest in such kind of lawful money as the trustees may determine, for the purposes specified in section 2729a, of the Revised Statutes of Ohio, as the same now provides or may hereafter be amended, the trustees shall issue and

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deliver, and the bankers shall purchase and receive, refunding bonds maturing fifty years after date as aforesaid, and payable both as to principal and interest in gold coin of the United States, of or equal to the present standard of weight and fineness, and in other respects of the same character as the bonds described in article 1, and upon payment therefor in outstanding bonds or cash of a premium of one per centum of the par value thereof, in addition to the par value and accrued interest from the date of the bonds until the time of such payment.

"5. All bonds deliverable by or to the trustees under this contract shall be received and paid for in either the city of Cincinnati or the city of New York, as may be elected by the bankers with reference to each delivery.

"6. On or before the first day of January, 1899, the bankers shall present to the trustees evidence satisfactory to the trustees that a sufficient proportion of this contract has been executed by the bankers or their assigns approved by the trustees, or has been assigned to and assumed by assignees similarly approved whose responsibility is satisfactory to said trustees, to assure the provision for that portion of the debt described herein which matures in the year, 1902.

"On or before the first day of January, 1904, the bankers shall present to the trustees evidence satisfactory to the trustees that the remaining part of this contract has been sufficiently executed by the bankers or their assigns, approved by the trustees, or has been assigned to and assumed by assignees similarly approved whose responsibility is satisfactory to the trustees to assure the provision for that portion of the debt described herein, which matures after the first of January, 1904.

"If the bankers fail to present evidence satisfactory to the trustees in accordance with either of the two paragraphs hereof next preceding, then, and in either such event, and at any time thereafter before such satisfactory evidence shall have been presented, the trustees may at their option terminate this contract by giving thirty days written notice of their election so to do to the bankers; and such termination shall absolutely discharge and put an end to this agreement, and the rights and liabilities of all parties and their

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assigns thereunder, and shall release the bankers and their assigns from all damages and claims for damages whatsoever upon or arising out of this contract or any part thereof.

"7. The bankers may assign to responsible parties, satisfactory to the trustees, this contract as to all of said bonds or any part or parts thereof, such assignees assuming and agreeing to perform all the stipulations of the bankers herein to the extent of the interest assigned to them respectively. Copies of every such proposed assignment shall be forthwith filed with the president of the trustees, and no such assignment shall take effect until the same shall have been approved by the trustees.

"8. The trustees contract only in their official capacity, and in no event are they or any of them to be individually liable because thereof; and the bankers bind themselves, their successors and assigns.

"In witness whereof, hereto, and to a duplicate hereof the parties of the first part have caused their name to be signed by William Edward Coffin, their general manager, thereunto duly authorized, and the parties of the second part have caused the same to be signed by Julius Dexter, their president, the day and year first above written.

"Roberts and Company

"By W. E. Coffin,

"General Manager.

"The Trustees of the Sinking Fund

"of the City of Cincinnati, by

"Julius Dexter,

"President."

It is claimed by the plaintiff that in making this contract the said trustees exceeded their authority in that, by it, the bonded indebtedness of the said city is increased over three millions of dollars, and that in fact, the contract really contemplates a sale of the bonds by the trustees rather than a refunding. And further, that by the contract the Cincinnati Southern Railway Trustees are deprived of the right to refund the bonds issued by the city for the building of said railway, which by the law of 1898 (93 O. L., 672), they are authorized to do.



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The right to make this contract is claimed by said trustees by virtue of section 2729a, Revised Statutes, which section is as follows:

“The sinking fund commissioners in cities of the first grade of the first class, for the purpose of refunding the bonded debt, exclusive of street improvement bonds, of the city for which such trustees act, at a lower rate of interest, and for the purpose of buying the fee simple of real estate held by the city under perpetual leases, wherein is secured to the city the option to buy the fee simple at a fixed price, and where the money to buy can be procured at a smaller rate of interest on the price than is represented by the stipulated rents, shall have power to make and issue the bonds of such city, with coupons or registered, due fifty years, and redeemable thirty years from date, bearing interest at a rate not greater than five per centum per annum, payable semi annually, to an aggregate amount not exceeding twenty-six millions of dollars, to be known as———consolidated sinking fund bonds.

“The bonds shall be signed by the president of the trustees of the sinking fund, countersigned by the auditor of the city, and have the seal of the city issuing them affixed.”

This section, with the limitations imposed by it, undoubtedly gives the sinking fund trustees full authority to refund the bonded indebtedness of said city. The act of April 25th, 1898, supra, section 2, is as follows:

“The trustees of the said railway are hereby authorized by a proper endorsement or stamping on any of the outstanding bonds, and the coupons thereof, issued under the act to which this is supplementary, to agree to an extension of time of payment of said bonds for a period not to exceed forty years from the maturity thereof, upon the holders of such portion of said bonds, as said trustees may agree with, agreeing to reduce the interest thereof to such rate as said trustees shall fix, not exceeding three and a half per centum per annum; and said trustees are hereby further authorized to cause to be engraved, printed and attached to such bonds, such additional coupons as may be necessary to evidence the interest to be paid for the extended time of payment of said



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bonds. Any expense incurred by reason of the extension aforesaid shall be paid by the city treasurer, upon the order of the board of trustees of such railway out of any income derived from said railway.''

While this act does not use the word "refund", but uses the phrase, "extend the time of payment", it provides a scheme by which the railway trustees may virtually refund the bonds of said city issued for the construction of said railway; and while this is the last expression of the legislature on the subject of refunding these bonds, it does not in terms repeal section 2729a, supra, and we are of opinion that there is not necessarily any conflict between them, and that they may both stand, with each board having a right to refund these bonds, with the limitation that whichever board acts first and refunds the bonds exhausts the power and thus deprives the other of the right to perform the same act. Both bodies can not do the same act, but either may.

It is apparent then, that it is of first importance to ascertain whether by this contract, the sinking fund trustees have in a proper manner provided for the refunding of these particular bonds, for it will be noticed, that all the bonds provided for in the contract, except nine hundred and ninety-two thousand dollars, are Southern Railway bonds; for it would seem evident, if both boards are to have the right to refund these bonds, any contract made by either, looking to the refunding of these bonds, must have a reasonable operation with a view to respecting the rights of either to perform the same act, and it seems to us clear, that any contract of this kind to be binding, must not in its nature be prospective to an unreasonable time as to its fulfillment. It would be reasonable to hold that it would not be absolutely necessary that the contract should be executed before it would be protected, for it might be that a contract of such

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magnitude, and necessarily somewhat complex, at the best requiring considerable time for performance, should be given considerable time for performance, for it would hardly be probable that a contract concerning this amount could be performed in a few days, or even a few weeks. At the same time, a contract which is not to be performed within three, four or five years would seem to be unreasonable as to time. When it is considered if the contract is valid and it does not actually refund any bonds, but merely provides for what may be done, that it in effect, takes away from the other board the right to perform the same duty, it would be difficult to see how the equal right of each board to refund, granted by the legislature, can be maintained if either board may forestall the other by making a contract to refund at an unreasonable and distant period.

It thus becomes important, in this view, to ascertain, first, what each part has agreed to do by this contract. The contract recites that the sinking fund trustees propose to refund the bonds theretofore enumerated, and that the bankers propose to purchase a sufficient number of refunding bonds to refund said outstanding bonds, and then follows the following provision: "That the trustees agree to sell and deliver to the bankers, and the bankers agree to buy and accept from the trustees \* \* \* subject to the following conditions." Then follows certain provisions in regard to the place of payment, denomination and character of bonds. Then follow these provisions:

"For the refunding bonds thus to be purchased by the bankers, they shall make payment at the time of delivery either in cash or outstanding bonds of the issues to be refunded. If said payment be in cash, it shall be the par value of the bonds \* \* \* If such payment be in outstanding bonds, the same shall be accepted by the trustees at prices which would yield or represent to the city of Cincinnati, an annual return of three and a half per centum per annum upon the cost of said bonds to the said city \* \* \* as it is probable that the larger part of the out-

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standing bonds delivered by the bankers to the trustees will be delivered by them before maturity.”

Article 3, of the contract provides that the bankers may only purchase refunding bonds for cash within ninety days next before the maturity of each of the issues first above mentioned, and then only to the amount of outstanding bonds maturing within said ninety days, and if this is not done, the trustees may proceed as to them may seem necessary to provide the required money.

“All outstanding bonds described as, and when acquired by the bankers, shall be by them promptly tendered to the trustees. Upon such tender by the bankers to the trustees of any of the outstanding bonds more than ninety days before the maturity of the bonds so tendered, the trustees shall accept the bonds so tendered, and pay the par value thereof, and the premium, if any, thereon with refunding bonds or cash as above provided.”

In this article it is provided that if the bankers shall fail to deliver bonds at certain times and to certain amounts, the trustees may, at their option, terminate the contract. The bonds to be tendered in this provision is commencing with January 1st, 1899, and concludes January 1st, 1902, covering a period of three years, within which time, three million, five hundred thousand dollars is in contemplation of delivery at least. The sixth article provides that on or before January 1st, 1904, the bankers shall present to the trustees evidence satisfactory to the trustees that the remaining part of this contract has been sufficiently executed by the bankers for that portion of the debt which matures after January 1st, 1904.

It will thus be seen that this contract in any event, may run, if the bankers so desire, for a period of five years, provided they comply with the purchase of outstanding bonds in the amounts therein specified, and whether or not a bond is delivered to the trustees more than ninety days before the maturity of the debt due in 1902, the contract

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may continue until that time, if the trustees do not terminate the contract. For it will be noticed that the bankers do not agree to turn in any outstanding bonds at any time. All the bankers agree to do is:

“And the bankers agree to buy and accept from the trustees so many of the refunding bonds hereinafter described as can be lawfully issued and shall be necessary to be sold to provide for the refunding of the several issues of bonds above described, subject to the following reservations and conditions.”

The next provision that they agree to do is, to turn over to the trustees promptly any outstanding bonds that they may have purchased, but the bankers nowhere agree to purchase any outstanding bonds. If the bankers do not deliver to the trustees the bonds at the time, and in the amounts therein specified, the trustees may terminate the contract, but the trustees may not exercise this privilege; and if they should not, this contract would be in force for more than three years and a half and not a bond be refunded, for the bankers have not agreed to deliver a single outstanding bond before that time. This statement in the contract, that, “As it is probable that the larger part of the outstanding bonds delivered by the bankers to the trustees will be delivered by them before maturity”, comes far short of being an agreement to deliver any bonds. Ninety days before the maturity of the debt due in 1902, the bankers have agreed to buy from the trustees the bonds necessary to be issued to redeem the bonds due ninety days thereafter, and it is possible that this may include all the bonds then about to mature. The effect of such a contract would be, that for three and a half years not a bond would be refunded. It is no answer to this to say, that it is not likely to occur. It is sufficient to say that it may occur. This leaves out of view the further provision of the contract which, as to certain bonds, extends the life of the contract

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certainly to January 1st, 1904 and possibly until ninety days before the maturity of the debt due in 1909.

The fault with this contract is, that it does not refund any bonds. If valid and binding, it may tie the hands of the Southern Railway Trustees, so that they may not refund these bonds for a period of more than three and one-half years, and yet not a single bond be refunded. It seems to us that this is an unreasonable exercise of the right to contract with reference to the refunding of these bonds. For while not refunding any bonds, the sinking fund trustees have prevented the Southern Railway Trustees from exercising an equal if not a better right given them by the law. For this reason we think this contract invalid as to the bonds given for the construction of the Southern Railway.

Section 2709 provides that:

“All sales of bonds other than to the sinking fund of any municipal corporation shall be to the highest and best bidder after thirty days’ notice in at least two newspapers of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and the length of time the bonds have to run, and the time and place of sale.”

We are of opinion that this section applies to the action of the sinking fund trustees under section 2729a, if the refunding of the bonded debt under that section is accomplished by merely selling bonds to raise money in order to pay outstanding bonds when they mature. The language of the section is broad and comprehensive. It is, “all sales of bonds” and there can be no reason why this section should not apply to a sale of bonds which is necessary in order to refund a debt, any more than it would be in order to raise money to meet any other obligation. The sale to the highest bidder after proper publication is necessary to the protection of the public. It is as requisite in one case as in the other. As to the wisdom of such a law there can

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Guckenberger v. Dexter et al.

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be no question. Therefore, if this contract is a sale of bonds for the purposes of raising money to pay the outstanding bonds, and the refunding scheme is carried out in this manner, the contract can not stand.

What is the contract? The contract recites:

“Whereas, the bankers have proposed to purchase a sufficient number of such refunding bonds \* \* \* Now therefore, this agreement, witnesseth, that the trustees agree to sell and to deliver to the bankers, and the bankers agree to buy and accept from the trustees.”

Evidently the contracting parties thereto thought the contract made was simply a contract to sell by the one party and a contract to buy by the other.

The fact that the contracting parties understood it to be a sale of bonds, would not necessarily make it such, provided what they did actually agree to do was not a contract to buy and sell bonds; but we are inclined to hold that the provisions of the contract relating to the buying by the bankers of outstanding bonds and delivering the same to the trustees, and receiving in return bonds of the city, is not a sale of bonds. But the defect in the contract is, that there is no agreement that any number of bonds will thus be refunded, and at the furthest it would not be more than one-half of the bonds to be refunded, and in fact, it is possible that all the bonds, might, under this contract, be taken ninety days before the maturity of outstanding bonds, which, we think would be nothing else but a sale of bonds, and therefore this contract can not stand by reason of section 2709.

Under this contract it is possible that the interest bearing debt of the city may be increased by over three million dollars. Can this lawfully be done? Section 2729a *supra*, provides that the aggregate amount of bonds issued by the trustees in refunding the debt shall not exceed twenty-six million dollars. The reason for this limitation becomes ap-

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parent when it is known that the bonded debt of the city at the time of the passage of this law was about twenty-six million dollars, including the bonds of the city then held by the sinking fund trustees. Therefore, if the entire debt of the city had then been refunded, there could have been no material increase in the interest bearing debt by reason of this limitation.

The last expression of the legislature on the debt created by the Southern Railway construction, *supra*, provides the manner in which these bonds may be refunded. The word used is "extended", but it is in effect a refunding scheme. By the terms of this act there can be no increase in the interest bearing debt. It would hardly be reasonable to suppose that if these two boards are given the same right to perform the same duty, that in regard to so important a matter as the increase of the bonded debt, bearing interest, that one might increase it when the other could not.

Taking these two acts together we are forced to the conclusion that the Southern Railway bonded debt can not be increased by any refunding scheme by either board, which increases the interest bearing debt, and for this reason also the contract is invalid.

*Peck & Shaffer and F. Hertenstein, for Plaintiff.*

*Lawrence Maxwell, J. B. Foraker, and Kinkead of Corporation Counsel, for Defendant.*

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Dec. Term, 1898.)

Before Hale, Caldwell and Marvin, JJ.

SEYMOUR F. ADAMS, JESSE H. MORLEY and JOSEPH COLWELL as Executors of the last Will and Testament of MOSES C. YOUNGLOVE, Deceased, Plaintiffs, v. JOSEPH C. SHIELDS, as Treasurer of Cuyahoga County, Ohio, Defendant.

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*Earnings of corporation not property of stockholders until dividend declared—*

(1). The net earnings of a corporation are the property of the

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**Seymour F. Adams et al. v. Shelda, Treasurer.**

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corporation until such time as a dividend is declared, dividing the surplus among its stockholders.

*Same—Scrip certificates—*

- (2). Issuing scrip certificates to the stockholders of a corporation, redeemable in the future in stock of the company, for surplus earnings, is not a division of the surplus in money, or a promise to pay money among the stockholders. In such case the corporation continues thereafter to be the owner of such surplus, and the stockholders gain nothing more than a promise to have stock in the future for the surplus.

*Same—Certificates taxable by corporation, not by stockholders—*

- (8). Such scrip certificates, while outstanding, represent to the owner of the same, the share he will be entitled to in the surplus capital of the corporation. And if the company be an Ohio corporation, and returns and pays taxes on all its capital in Ohio, then such scrip certificates are not to be listed for taxation in Ohio, and are not taxable.

*False tax return—What constitutes—*

- (4). Under sec. 2781, Revised Statutes of Ohio, the taxpayer does not make a false return, or evade making a return, of his property, where he withholds such property from his list on the honest belief that the same is not taxable, coming to such belief upon the advice of eminent attorneys at law.

*County auditor's power to correct false tax returns—*

- (5). The county auditor has not jurisdiction to act under sec. 2781, unless there has been a false return, or a return evaded within the meaning of the law.

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**Error to the Court of Common Pleas of Cuyahoga county.**

**CALDWELL, J.**

The plaintiffs brought this action to enjoin the defendant from collecting the taxes on certain property that belonged to Moses O. Younglove in his life-time and at the time of his death, and since his death to the said executors of his estate, which taxes, it is claimed, were by the county auditor placed upon the county tax duplicate without warrant of law.

The facts of the case are mostly admitted, and there is no serious controversy as to any of them.

April 13, 1892, Moses O. Younglove died testate. At



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the time of his death, and for many years prior thereto, he had resided in Cleveland, Ohio.

The executors of the estate, the plaintiffs in this action, are residents of Cuyahoga county, Ohio, and have there resided at all times during their trust.

Moses C. Younglove, on the day before the 2nd Monday of April in each of the following years, was the owner of and held scrip certificates in the Cleveland Gas Light & Coke Company, as follows:

For 1887	11,233	shares of the par value of	\$112,230.
" 1888	19,021	" " "	190,210
" 1889	19,026	" " "	190,260
" 1890	22,147	" " "	221,470
" 1891	25,580	" " "	255,800
" 1892	25,580	" " "	255,800

During none of these years did Mr. Younglove include in his return of his property for taxation, any of said scrip certificates, nor did the executors return them for the year 1892.

The county auditor, after proper notices to the executors and after hearing testimony, decided to tax the certificates for each of the years before named and for the amount before named, as owned each year by Mr. Younglove or his estate; and the auditor, on August 15, 1893, entered for taxation an amount equal to the par value or amount of said scrip certificates of indebtedness, increased by a penalty of fifty per cent. of the same for the respective years, and multiplied the same by the rate of taxation for said years. These entries were carried into the auditor's book as provided by law, and were placed on the county treasurer's book for collection, and the auditor gave the treasurer the certificates provided by law.

The county treasurer was about to proceed to collect the taxes and this added increase by his fifty per cent. penalty, when this action was brought to restrain such a collection.

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The Cleveland Gas Light & Coke Company is a corporation incorporated under an act passed February 6, 1846, with a capital of forty thousand dollars, divided into shares of ten dollars each.

On March 17, 1894, this act was amended and the capital increased to sixty-five thousand dollars.

The capital was, after years, increased, until 1871 there were 75600 shares, face value \$756,000.

In 1893, by authority given, the stock was increased to \$3,00,000, divided into shares of \$100 each.

The Cleveland Gas Light & Coke Company was an Ohio corporation, having its business and property wholly within Cuyahoga county, Ohio.

June 17th, 1873, the board of directors of said company adopted the following resolution:

“Whereas, the earnings of profits of this company amounting to more than \$151,200, have, from time to time, been invested in the extension of the company's works, and providing additional facilities for production and distribution made necessary by the increased demand for gas, and in that manner a large addition has been made to the value of the property of the company by withholding from the stock-holders monies which have been fairly earned, and but for the above-mentioned expenditures would have been paid to them; and,

“Whereas, upon a fair and just estimate of the property of the company, it has been in this manner increased in value over the amount of the present capital stock by at least the said sum of \$151,200; and,

“Whereas, the stock-holders desire to realize without impairing the property of the company or profits which have been thus invested, and to make them more available;

“Now therefore, it is resolved, that a dividend from the profits of the company thus invested, of \$2 for each share of the present capital stock of the company, to be paid pro rata to holders thereof in scrip after the form following, which scrip shall entitle the respective holders thereto to all the privileges and advantages declared and expressed therein.”

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The form of the certificates of scrip used in the different issues of the same is as follows:

“THE CLEVELAND GAS LIGHT & COKE COMPANY.

“June 17th, A. D. 1873.

“No. of Shares.....

“No. .... of scrip.

“This is to certify that.....  
and.....heirs or assigns will be entitled, upon the surrender of this certificate, to shares of ten dollars each of the capital stock of this company, whenever and so soon as such capital shall be increased one hundred and fifty-one thousand and two hundred (\$151,200) or more, above the present amount thereof; and until such increase is made and this certificate surrendered for conversion, dividends from the earnings of the property or from the proceeds of the sale of its property, whether made in money or in scrip, shall be paid to the owner of the certificate appearing as such upon the books of the company, pro rata, with and the same as to the owners of the shares of the capital stock; provided, however, that if at the time of the increase of the capital stock there shall exist legal disability which will prevent the conversion of this certificate into stock, there shall be paid to the owner thereof upon demand and its surrender, the par value in money of the shares as herein provided for. This certificate is transferable only at the office and upon the books of the company.

“Witness the corporate seal of the company and the signatures of the president and secretary, at Cleveland, this....day of....., 18..,

.....President”

.....Secretary.”

“Seal of Company.

(There was printed on the back of it this language:)

“For value received the undersigned.....  
assigned and transferred unto.....all.....right  
and title to the scrip certificates of the Cleveland Gas Light  
& Coke Company and do hereby constitute and appoint  
“.....true and lawful attorney for and in  
“.....name and behalf to make and execute all necessary  
acts of assignment, transfer and surrender.....required”

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by the terms of said scrip certificates, and the regulations and by-laws of that company.

“In witness whereof, I have hereunto set.....hand and seal this.....day of.....,18....

“Sealed and delivered in the

“Presence of.....

.....Seal.”

The Cleveland Gas Light & Coke Company made nine issues in all of scrip certificates. The company from year to year used the profits of the company in extending its plant, mains, etc., and then gave out to the stock-holders the scrip certificates, which the stock-holders retained until February 14th, 1893, and then they were exchanged for stock.

On January 22, 1874, the board of directors passed the following resolution:

“Whereas, the earnings and profits of this company amounting, in excess of all previous dividends, to more than \$90,730., which amount has been invested in the property of the company, increasing the value of the same by at least that amount; and,

“Whereas, stockholders desire to realize without impairing the property of the company or profits which have thus been invested, and to make them more available, and for that purpose they have this day hereunto duly authorized this board:

“Therefore resolved, that a dividend from the profit of the company one dollar on each share of the present stock and scrip \$1, amounting in all to 90,720 shares, to be paid pro rata to the holders of said stock and scrip respectively, in scrip, to be known as scrip No. 2, bearing this date, to be issued in the same form and manner in all other respects as that known as scrip No. 1, as shown in the records of this company, on the 17th of June, 1873, and bearing that date; said scrip like the former shall entitle the respective holders thereof to all the privileges and advantages declared and expressed therein.”

At the time said scrip certificates known and numbered 3, 4, 5, 6, 7, 8 and 9 were issued, the board of directors of

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said company passed and placed on their minutes a resolution similar in all respects to the one foregoing, except that each successive resolution provided for issuance of scrip upon all issues of scrip theretofore made, and the capital stock.

Aside from the portion of the net earnings of the said company, used by it as afore stated and for which it issued scrip certificates, other portions of the net earnings of the company, not used in extending its property, were from time to time divided in money among the stock-holders as dividends.

The Cleveland Gas Light & Coke Company at all times during the years of the issuing of said scrip certificates and down to the time of the commencement of this action returned from year to year to the proper officer what purported to be a list of its capital stock and all its property, and paid all taxes assessed thereon. A short time before said the Cleveland Gas Light & Coke Company issued said scrip certificates the first time, the directors of the same applied to Morrison R. Waite, of Toledo, Ohio, and Judge Rufus P. Ranney of Cleveland, Ohio, for advice and counsel as to whether the company could issue scrip certificates; to give the company a proper and legal form of certificates, and as to whether the form by them furnished would, under the laws of Ohio, be the subject of taxation. The directors of the corporation were, by these eminent jurists, advised as to the form of certificate and that the scrip certificates would not be, under the laws of Ohio, taxable.

The purpose of the corporation in issuing scrip certificates instead of shares of stock for portions of net earnings of the company by it used in the extension of mains, etc., was, that it could not issue such stock without legislative permit, and if such permit were obtained, it would be after the new state constitution which would subject the company to the laws under the new constitution, and for certain reasons it did not wish this at that time.

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The questions of law for determination in this case are: Are the scrip certificates taxable under the laws of Ohio? And had the auditor, under the facts of the case, authority of law for placing the tax and penalty on these tax certificates in the year 1892 for the years 1887, 1888, 1889, 1890, 1891 and 1892?

The auditor did this under section 2781 of the Revised Statutes, which is as follows:

“If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall for each year, ascertain as near as possible, the true amount of personal property, monies, credits and investments that such persons ought to have returned or listed for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next sections are made; and to the amount so ascertained as omitted, for each year he shall add fifty per centum, multiply the omitted sum or sums, and as increased by said penalty, by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect the same as other taxes.”

Counsel for defendant claim that the scrip certificates are mere evidences of indebtedness, or certificates of indebtedness, in which the company agrees to pay in money, and, as such, are mere bonds of the company, and hence taxable under section 2746, Revised Statutes, which reads:

“Personal property of every description, monies and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.”

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They further claim that they are not shares of stock, as the corporation had no authority to issue them as stock, nor did they intend to do so, and, though they may be in some respect like shares of stock, yet not being stock, they are not exempt.

Counsel for plaintiffs claim that the scrip certificates represent shares in the capital of the company, and the company being an Ohio corporation paying taxes on it, its property in this state, there is no authority of law for requiring these scrip certificates to be listed for taxation.

They also claim that neither Mr. Younglove nor the executors of his estate, either fraudulently or negligently made a false return or evasively withheld the return of the scrip for taxation, and hence the auditor had no jurisdiction to act under section 2781.

The surplus or earnings of a corporation belongs to the corporation and the corporation must list the same for taxation and pay the taxes thereon. The corporation ceases to be such owner, and is relieved from the taxes thereon only when it declares a dividend out of such surplus and pays it out to the stockholders. The dividend may be declared by the corporation and, instead of paying the money, it may issue to the stockholders scrip certificates of indebtedness. This is sometimes done where the money representing the surplus is loaned out at the time the dividend is declared, or is, for any other reason, not available at the time the dividend is declared. Scrip certificates of this nature are certificates of indebtedness; they are promises to pay, and usually fix the time for payment and bear interest; if not paid when due, the holder may sue on them to recover. The company, by issuing such certificates, appropriates the money to pay its declared dividend to its stockholders. It gives up its right to retain the money as its own. On the other hand, if the corporation appropriates its surplus to its own uses, invests it in its plant and business in such a way

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that the investment must be permanent, and then announces such investment to its stockholders and issues to them scrip certificates in which it promises that it will at some time in the future issue to such stockholders a certain amount of stock if the law then permits such issue, the result is entirely different. The corporation does not in any way change its situation; it still owns, holds and controls as its own, the entire surplus. It has not declared, by word or act, any intent of giving up, 'at the time, nor in the future, to the stock-holders any part of the surplus; it makes no promise to pay; it has done nothing to change its relation or the stockholder's relation to the surplus. The stockholder gains nothing; he is no richer after he gets his scrip than he was before; he has no more nor no less than he had in the company; he gets no promise of any more. All that the company has parted with is a promise to issue stock. All he gains is a promise to be given stock.

The certificate accomplishes nothing beyond this.

It is easy to be misled by the fact that the owners of the scrip certificates can borrow money on them. Suppose the scrip had never been issued, and Mr. Younglove had gone to the directors and had them certify by a letter to him, the amount of the surplus and what part of it would go to him, either in money or stock, when the surplus should be divided, he could have taken his letter to any bank in Cleveland, and, on the information in it contained, he could have borrowed money by pledging his prospects of sharing in any future distribution of such surplus.

No one would for a moment contend that such a letter would be property, even if it contained a positive agreement to give Younglove his pro rata in stock in the future, at the option of the company.

The scrip has no value in and of itself beyond its promise to issue stock; hence a pledge of it can be no security beyond that promise.



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June 17, 1873, the Cleveland Gas Light & Coke Company passed a resolution reciting the facts, that a surplus had been earned and invested in its works the same as its original capital, by which the value of the property had been largely increased, and which earnings, if not thus used, would have been used for dividends, and as the holders of the stock desired to realize without impairing the property of the company, or the profits which have been thus invested, and to make them more available therefor it resolved that from the profits a dividend of two dollars for each share of the present capital stock to be paid pro rata to the holders thereof in scrip after the form following, which scrip entitled the respective holders thereof to all the privileges declared and expressed therein.

This resolution declares a dividend in scrip of two dollars on each share, but how the scrip is to be paid, is not stated in the resolution but, for terms and manner of payment, refers to the scrip certificate.

The certificate certified that——, his heirs and assigns, will be entitled to so many shares of ten dollars each of the capital stock of the company, whenever and so soon as such capital stock shall be increased \$151,200 or more. Then it provides for dividends on the scrip the same as on the stock when future dividends of money or stock are declared. Then it provides that, if at the time of the increase of the capital stock, there shall exist any legal disability which will prevent the conversion of this certificate into stock, there shall be paid to the owner thereof, upon demand and its surrender, the par value in money, of the shares, as therein provided for.

In this resolution and scrip, there is no promise to pay the dividend in money except upon a condition which never arose. There was a condition precedent to any promise to pay money. The scrip being redeemed by the issue of

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stock when the condition precedent did not exist, the promise to pay money is now to be considered as if never made.

The entire plan and arrangement as set forth in the preamble to the resolution show there was no intent to pay money. Hence it follows, the scrip can not be called certificates of indebtedness and, therefore, can not be in the nature of a bond of the company. If a bond at all of the company, for any thing, it is only for future stock, and, as such, it is not, within the statute, enumerated as taxable property.

Suppose this last statement to be incorrect and that such a bond is contemplated by the statute, then does it follow, because only investments in stocks in domestic corporations that pay tax on the corporate property are exempt, that this scrip not being stock, can not be exempt? This must depend upon the intent and purpose of the statute.

The policy of the legislature is to tax investments in the stock of foreign corporations, but not to tax such investments in domestic corporations, where the corporation pays taxes on all its capital stock. Why this distinction? It is not intended as a gratuity, or a charity. It is on this basis: for the purpose of taxation, the former kind of stock is considered a distinct kind of property as distinguished from the corporate property, while in the latter a (domestic company) investment in stock is not, as property, considered distinct from corporate property. If a domestic corporation has paid the tax on its property, it has, within the meaning of the tax law, paid the tax on the investment in its stock. This is certainly the meaning of the law, and the only reason for making the exemption. It follows most conclusively that investments in the stock of a domestic corporation, within the meaning of the statute, means investments in the capital or corporate property of the company.

This, then, being the intent and meaning, it matters not

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how such investment is evidenced. We need not, when we have the object itself, hunt for the shadow. It is not important whether the shadow be a certificate of stock, or a scrip certificate for stock, for the object itself is invested in the capital stock, and the scrip being evidence of the investment, it is not taxable.

It has been urged that the scrip certificates are property, are assignable, may be separated in ownership from their parent stock, and thus become a distinct and independent class of property. Suppose this is all true, does it follow that it is not exempt from taxation?

The certificate, under any ownership, does no more than to represent a promise to issue stock, and this promise reflects upon it its value and, as before said, the property, whatever it is, within the meaning of the tax list, is the investment in the corporation property, and is not taxable.

It has been held by the highest courts of other states and the federal courts, that a scrip certificate, which does not promise to pay money but only a dividend in stock, and shows that the corporation retains as its own the surplus, will not relieve the corporation from paying taxes on the surplus:

People's Gas Light Co. v. Assessors, 16 Hun, 196; People ex rel. v. Assessors, 76 N. Y., 202; Dutton v. Bank, 53 Kas., 454; Sun Mutual Ins. Co. v. Mayor of New York, 8 N. Y., 250; Bailey v. R. R. Co., 22 Wall., 604; Same v. Same, 106 U. S., 109.

If the company is not relieved from payment of tax on this surplus, then, if right in what I have said before, the scrip owner need not pay.

The plaintiff's claim that neither Mr. Younglove nor they as executors of his estate, made false return or statement; nor did they evade making a return within the meaning of section 2781, even if these scrip certificates were taxable. This proposition is to be determined by the facts in the

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case, bearing upon this question, and the construction of this section by the supreme court. This section has repeatedly been before the supreme court for construction.

In *Ratterman v. Ingalls*, 48 Ohio St., 468, and in *Probasco v. Raines*, 50 Ohio St., 379, that court held that in order that a return be false under section 2781, it must appear that the one making the return, either designed to mislead or deceive the assessor, or that he at least was guilty of culpable negligence; that the word "evade" in the statute means "to avoid by fraud or contrivance." It would seem to follow that where there is no false return or evasion under this section, there is no authority under this section to correct or make the return either as to the regular tax or penalty.

It only remains to determine under the facts of the case, whether Mr. Younglove or his executors had an honest belief founded upon good and sufficient authority, for not returning the scrip certificates for taxation.

The corporation, before issuing the scrip certificates, took the advice and counsel of Morrison R. Waite, of Toledo, Ohio, (who was thereafter the Chief Justice of the United States), and Judge Ranney of Cleveland, Ohio. The proof shows that these eminent attorneys advised the directors of the corporation, of which advice Mr. Younglove had full knowledge before the certificates were issued, that these certificates would not be taxable under the laws of Ohio.

There was no material change in the law under which this advice was given, and the law, that existed during the time of the issuing of these certificates.

Mr. Younglove, upon this advice, believed these tax certificates were not taxable, and, after his death, the executors who had the same information, believed the same, as is testified in this case.

Aside from this, a large amount of these tax certificates issued in Cleveland by the gas company, were used freely

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in the banks of the city of Cleveland. It was a matter of public notoriety. It is much more than likely that the taxing officers of the county knew of the existence of these certificates, and knew that they were not returned for taxation. It is not an unreasonable conclusion in this case to draw, that all parties had full knowledge as to the existence of the certificates, and that all have for years acquiesced in their non-taxability.

If Mr. Younglove relied upon this advice and counsel that I have stated, and for this reason did not return his tax certificates in the honest belief that they were not taxable, then he was not guilty of making a false return or evading a return under section 2781.

This being true, the auditor had no right to make the assessments in question against the estate of Mr. Younglove, being entirely without jurisdiction as before stated.

The injunction is allowed and made perpetual.

*Judge W. W. Boynton, and Squire, Sanders & Dempsey,*  
for Plaintiffs.

*Peter Kaiser, Judge J. M. Jones, and Gen. E. S. Myers,*  
for Defendant.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—June Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

THE EUREKA FIRE & MARINE INSURANCE COMPANY  
v. J. L. BALDWIN.

*Fire insurance policy—Waiver of proof of loss—May be shown on averment that insured complied with conditions—*

Where, in a suit on a fire insurance policy requiring proof of loss forthwith, it appeared that the proof had only been made nine months after the loss, while the petition averred generally compliance with all conditions, Held: Evidence of proof of waiver of that condition, by the company, will be admissible at the trial, although no such waiver is specially alleged in the petition.

*Occupation of house—What will amount to—*

Where the policy contains a provision that it shall be void if

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Now, the evidence, introduced in support of the waiver, differed very much from that alleged in the petition, but the court says, on page 636:

“Then we have an objection to the proofs offered to establish the waiver, for that the declaration alleges that waiver to have occurred in a manner different from that set forth in the offer of proof. But as the narr. without the special clause, the subject of controversy, would have sustained the offer, we may treat this part of it as surplusage. We understand, indeed, that by the strict rules of pleading, if an allegation is made in the declaration which may be material in the trial, though immaterial in the pleadings, it must be proven as laid. But in our times, the severe rules of pleading find but little encouragement,”

And cites authorities in support of that.

A large number of cases are reported, in which, where suit is brought upon commercial paper and the endorser is sought to be held, and the allegations of the petition are that notice has been properly served upon the endorser, the evidence may be permitted and recovery may be had upon showing that notice was waived by the endorser:

Taunton Bank v. Richardson et al., 5 Pickering, 444; Camp v. Bates, 11 Conn., 492; Windham Bank v. Norton et al., 22 Conn., 219; Raney v. Baron, Adm'r., 1 Fla., 327; Blakely v. Grant, 6 Mass., 388; these are all and each upon that proposition, that where the suit is brought, as I have said, upon commercial paper, you may plead notice to prove waiver.

The case of the Home Insurance Co. v. Lindsey et al., 26 Ohio St., 348, is a case to which our attention was called. The second clause of the syllabus reads:

“In an action on a policy of insurance which contains a condition that, in case of loss, proof of the loss shall be made and delivered to the insurer within thirty days after the loss occurred, the petition of which does not allege performance of such condition, or a waiver on the part of the insurer, is bad on demurrer.”

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This case is not directly in point upon the case that is before us here. Here there was an allegation of performance.

We are cited by counsel for plaintiff in error, to the case of *Mehurin & Son v. Stone*, 37 Ohio State, 49. In that case a suit was brought upon a building contract, and there was a departure on the part of the plaintiff in the work that was performed for the defendant under the contract. The petition alleged that the contract had been fulfilled on the part of the plaintiff. On the trial it was sought on the part of the plaintiff, to show that certain alterations in the work had been consented to by the defendant, and that thereafter a strict compliance with the contract had been waived, and the court there held that under the allegations of the petition that there had been performance of the contract, it was not competent to show a waiver. The third clause in the syllabus in the case named, reads: "Evidence tending to show that the defendant waived the performance of certain of the conditions of the contract by the plaintiff, is not admissible." The court, on page 58 in the opinion, say:

"A waiver, by one party to an agreement, of the performance of a stipulation in his favor, is not a performance of that stipulation by another. It is an excuse for non-performance, and as such should be pleaded" (citing cases). "An exception to this rule is said to prevail in actions by an indorsee against the indorser of a promissory note, where evidence of a waiver of demand and notice is held admissible and sufficient to support an allegation that demand was made, and notice given."

It will be observed that in the case last read, the suit was upon a contract, and it was alleged on the part of the plaintiff that he had performed, on his part, all that was to be performed; that was a building contract; that the thing for which he was entitled to recover, was the performance of the labor and the furnishing of the

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material which, by the contract, it was agreed should be done. Whereas, in the case at bar, although the furnishing of the proofs of loss is a condition precedent to recovery, it is not the thing, nor any part of the material thing which makes the Insurance Company the debtor of the assured; the debt accrues because of something else, to wit: the issuing of the policy and the occurrence of the fire, and although proof of loss is a condition precedent to recovery, it is not the proof of loss which is the thing for which recovery is sought.

It seems to us, that this is more nearly akin to the case of commercial paper. And upon the authority of the case in West Virginia, to which attention is called, and the Pennsylvania case, we hold, that there was no error on the part of the court in admitting evidence to show waiver of proofs of loss.

But it is said that the evidence is not sufficient to establish a waiver, when admitted.

It is conceded that if the Insurance Company denied all liability under the policy, that would be a waiver of proofs of loss.

That proposition is established by a large number of cases and authorities:

May on Fire Insurance, sec. 459, (citing a large number of authorities); Portsmouth Ins. Co. v. Reynolds, Adm'r., 32 Grattan; The Aetna Fire Ins. Co. v. Sparks, 62 Ga., 187: all these sustain the proposition just announced.

But was there a waiver? Was there a refusal to pay? Does the evidence establish such denial of liability, so as to constitute a waiver of proofs of loss? The agent of the company, who solicited the insurance and through whom the policy was issued, was G. C. Napes. After the fire Mr. Baldwin called on Napes. Napes went to the place where the fire had occurred, and another agent, by the name of Bohm, whom Napes says was the special agent of the company,



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and was an adjuster, went there, and after that Mapes wrote a letter to Baldwin; it reads:

“Collinwood, O., Agency, May 26th, 1894.

J. L. Baldwin,

Dear Sir:- Special Agent Bohm says that the vacancy of the house would spoil the policy, and that the company would not be liable for payment.. He also requested me to cancel the policy on the other house, as it is vacant and might share a like fate. The premium for the time yet to run would be \$3.00, for which I enclose my check. Please send up the policy by first mail

“Respectfully yours,

“G. C. Mapes, Agent.”

By virtue of section 3644, Revised Statutes of our state, Mapes was the agent of this company. He says in his testimony, that Bohm was the special agent and adjuster, and that he, Mapes, wrote this letter after consultation with Bohm. We think that there was a waiver on the part of the company. We are not prepared to say that the jury found wrongfully on the matter of waiver in any event.

But there was another condition in this policy, and that condition reads:

“If the premises become unoccupied without the assent of the Insurance Company, the policy shall become void.”

In the written portion of the policy, in the description of the premises, are these words:

“On the one and one half story frame shingle roof building and its additions adjoining and communicating, occupied and to be occupied by tenant as a private dwelling, situate on the North side of North Depot St., at Nottingham, Cuyahoga Co., O.”

The clause which I have just read, is the description of the premises in the policy. There is no dispute as to what the facts are about the occupancy of that building. At the time the policy was issued, a tenant of the owner, with his family, lived in the building. They moved

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out about April, the 18th or 19th, and thereafter, up to the time of the fire, a son of the plaintiff who was employed in the railroad yards during the night, slept in this house during the day, going to the house about ten o'clock in the morning and leaving it about five o'clock in the afternoon, and the undisputed evidence is that this occurred every day. The family of the plaintiff—of the owner of the house—lived in the house adjoining this house. Water was used from this house, by the family going into this house to get it, and that happened substantially daily, perhaps several times a day.

The son of the plaintiff who slept, in the house, had his bed there and things necessary for his sleeping in the house; aside from that, the house was not occupied.

The court left to the jury the question of whether the house was occupied or unoccupied. Though I am not authorized to speak for the court, for myself I do not understand that where there is no dispute as to the facts, there is any work for the jury to do. It seems to me that the court should have said whether the house was occupied or unoccupied. However, did the jury find right? The jury found specially that the house was not unoccupied. We think that the jury found right that the house was not unoccupied. We have examined the cases, not only those cited to us in briefs of counsel, but others, and, without taking the time to go over all the cases cited, we think that there are cases more nearly akin to the case now being considered than those cited on the part of the plaintiff in error, the effect of which is, to hold that this house was occupied at the time of the fire.

I call attention to the case of the Phoenix Insurance Co. v. Abraham Tucker, 92 Illinois, 64. Without taking time to read more than the seventh clause of the syllabus and a short extract from the opinion, I should say that the syllabus which I am about to read, seems to sustain the posi-

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tion that it was proper to leave to the jury the question as to whether the house was occupied, even where there was no dispute as to the facts of how the building was used.

“7. What is meant by the term ‘vacant and unoccupied,’ in a policy of insurance, as working a forfeiture of the policy, is a question of law; but whether a house was, at the time of a loss, vacant and unoccupied, within the meaning of the policy, is a question of fact for the jury.”

It does not fully sustain the proposition; but, however that may be, as I have said, we think the jury did not find wrong. On page 71 of the opinion, the court uses this language:

“The object of courts, when enforcing a provision in a policy like this, should be to endeavor to so construe it as to give effect to what might reasonably be supposed to have been the intention of the parties when they consented to it. It will hardly be contended that such a condition requires that the assured, or some of his family, should be actually in the house all the time.”

In this case there was the provision that the policy should be void if the building should be unoccupied.

In the case last cited the assured had lived in the house, and was living there at the time the policy was issued. He thereafter moved with his family, but left part of the furniture in the house, and he himself slept in the house for a time. His son or son-in-law moved his goods into the house to arrange it to live there, but they were not staying there all the time when the fire occurred. It was held that the house was not unoccupied.

Our own Supreme Court, in *Moody v. Insurance Co.*, 52 Ohio St., 21, in the opinion delivered by Judge Williams, says:

“What constitutes vacancy or non-occupancy of a building, is a question of law; but whether a building is vacant, or unoccupied, or not, within the meaning of the law, is a question of fact for the jury. To constitute occupancy of

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a dwelling-house, it is not essential that it be continuously used by a family. The family may be absent from it for health, pleasure, business or convenience, for reasonable periods, and the house will not, on that account, be considered as vacant or unoccupied. In the case of the Insurance Company v. Kiernan, 83 Ky., 468, it is held, 'that the condition in a policy on a house described as occupied as a family residence, containing a condition 'that it shall become void if the house 'shall become vacant or unoccupied,' the words 'occupied as a family residence' must be regarded as but a representation as to the then use of the house, and the condition is but an undertaking by the insured that the house shall not be without an occupant during the time covered by the policy; and the condition is not broken or violated or the policy become void 'upon the house ceasing to be occupied' as a family residence, it continuing to be occupied by one person, who had access to the entire building for the purpose of caring for it.'

The court says there that the jury did not find wrong in that case in finding that the house was not unoccupied.

This disposes of the errors assigned in the case for which it is sought to reverse it, and entertaining the views we do, the judgment of the court below is affirmed.

*R. B. Lee*, for Plaintiff in Error.

*J. F. Herrick*, and *P. P. McClure*, for Defendant in Error.

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(Second Circuit—Fayette Co., O., Circuit Court—Nov. Term, 1898.)

Before Shearer, C. J., Summers and Wilson, JJ.

BARCLAY v. SALMON.

*Change of venue—Bias, etc. of judge—Statutes construed.*

- (1). It is not necessary to incorporate an affidavit of the interest, bias or prejudice of a judge, made and filed as provided in section 550, of the Revised Statutes, into a bill of exceptions in order to bring it before a reviewing court, but it is sufficient to file it with the petition in error.
- (2). It is not necessary in such an affidavit to state facts showing interest, bias or prejudice, but merely to aver interest, bias, prejudice or other disqualifying fact.

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- (3). The right to file such recusation is not limited to cases in which all of the judges of a subdivision are so disqualified, but exists in every cause or matter, pending before the court of common pleas in any county, which may come before a judge so disqualified.
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Error to the Court of Common Pleas of Fayette county.

This suit was brought before a justice of the peace by Salmon as receiver, and afterward appealed to the court of common pleas. In his amended petition he avers, in substance, his appointment and qualifying as receiver in a certain action in said court, and his authorization to bring this suit; that by the order appointing him the defendants, to the action in which he was appointed, were directed to deliver to him possession of certain real estate, and he to take possession, rent the same and collect the rents; that prior to the date of his appointment the defendant, Barclay, had rented a part of said premises for a cash rental; that Barclay refused to surrender possession to him and, against his objection and protest, planted the same in corn and was about to remove the same; that he, Simon, is the owner of the corn and entitled to the immediate possession thereof; that the defendants have wrongfully detained from him the possession of said corn to his damage in the sum of one hundred dollars, for which, and for the recovery of said corn, he prays judgment.

To this amended petition a general demurrer was filed and overruled.

February 6th, 1898, Barclay filed an affidavit in which he says that he has good reason to believe and does verily believe that the Honorable H. B. Maynard, one of the judges of said court of common pleas, has a bias for the plaintiff and a prejudice against the defendant to said cause, and is therefore disqualified to preside at the trial of

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said cause, or to conduct, or hear, or determine any of the proceedings therein.

February 7th, 1898, the following proceedings were had, as appears from the transcript of the journal entries:

“This day came the plaintiff and his attorney, and thereupon it appearing to the court that the defendant John Barclay, heretofore filed herein his affidavit, assigning that Hon. H. B. Maynard, the presiding judge of this court, is disqualified from presiding at the trial of said cause, for the reasons stated in said affidavit, and the court, the said judge named in said affidavit presiding, being of the opinion that said affidavit is not sufficient, and that the alleged ground of disqualification does not exist, order that said trial proceed; to which said order of the court the said defendants and each of them except, and against the protest of said defendants, said trial proceeded, the said judge named in said affidavit presiding thereat, and the defendants refused to participate in said trial.”

A jury was impaneled and sworn and returned a verdict for the plaintiff; a motion for a new trial was filed in due time, assigning among other grounds,

“1. Because of irregularity in the proceedings of said court, in that the judge presiding at said trial assumed to proceed and conduct said pretended trial notwithstanding the disqualification of said judge so to proceed;” and

“6. Because all of the proceedings of said court and jury constituting said pretended trial were and are wholly illegal and a palpable invasion of the statutory rights of said defendants.”

The motion for a new trial was overruled, judgment entered, and in due time a petition in error was filed in this court assigning as error the overruling of the demurrer to the amended petition and the action of the judge in presiding at the trial. No bill of exceptions was taken.

SUMMERS, J.

Several questions are presented: first, does the petition state a cause of action; second, is a bill of exceptions neces-

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sary to bring the affidavit before this court; and third, the sufficiency of the affidavit.

The averment of ownership in the amended petition is based upon the facts stated, for otherwise they are not pertinent, and they are not sufficient to constitute the receiver owner of the property sought to be replevied.

It does not appear that Barclay was a party to the suit in which the receiver was appointed, or that he took the lease *lis pendens*. It does appear that Barclay rented the land for cash prior to the appointment of the receiver, and this precludes a presumption in support of the judgment that the entire crop was rent.

This conclusion requires a reversal of the judgment, and as the remaining questions are not likely to arise in the new trial, they well might be left unanswered did not the statute require this court to pass upon all the errors assigned.

Is a bill of exceptions necessary? In this state it seems to be well settled that affidavits filed in support of a motion cannot be considered by a reviewing court, even when copied into the record by the clerk, unless made part of the record by a bill of exceptions. *Sleet v. Williams*, 21 Ohio St., 82; *Goldsmith v. The State*, 30 Ohio St., 208; *Schultz v. The State*, 32 Ohio St., 276. But it is not necessary in order to bring the motion before the reviewing court, to include it in the bill of exceptions, although it is not required by section 5334, of the Revised Statutes, to be made a part of the record. Section 550 of the Revised Statutes, authorizes the filing of an affidavit of the fact of the interest, bias or prejudice of the judge, not in support of some motion or application, but as an original paper in the case, and upon its being so filed and the fact noted upon the trial docket, whether true or not, it disqualifies the judge to act in that case, and if he does act, it is one of the original papers which may be filed with the petition in error to ex-

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hibit the error complained of, under section 6716, of the Revised Statutes.

This distinction is illustrated in the cases of Sleet v. Williams, 21 Ohio St., 82 and Garner v. White, 23 Ohio St., 192. In each case a motion was made to discharge the attachment because the affidavit, upon which the writ issued, was insufficient, and because it was untrue. Affidavits were filed in support of the motion. In neither case was there a bill of exceptions, and in each case the supreme court passed upon the sufficiency of the affidavits upon which the writ of attachment issued, and in each case refused to pass upon the questions sought to be made by the affidavits filed in support of or against the motions to discharge.

But it is contended that the statute does not authorize the filing of an affidavit except when all the judges in the subdivision are interested or biased. If this is so, then the mere filing of an affidavit of interest or bias, in the absence of a showing that all the judges of the subdivision were interested or biased, would not bar the judge from sitting, but the fact would have to be proven, and a bill of exceptions would be necessary to bring the evidence into the record.

Brewer J., in *City of Emporia v. Volmer*, 12 Kas., 475, 478, says:

“The statute is silent as to the manner of establishing the fact. It declares simply that the change shall be made when the fact exists. The fact must exist. The court must find the fact to exist. If the judge’s personal knowledge is altogether ignored, it will often place him in a position of being compelled to find that to be a fact which he knows not to be a fact,—a fact, too, which carries with it something of an imputation upon himself. If it were to be determined by simply the affidavit of the defendant, there would be almost numberless changes of venue. Every defendant closely pressed would seek delay in this manner. A change of venue is a wrong to the public, unless the necessities of justice to the defendant require it. It works delay.



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It causes expense. It endangers a prosecution. A defendant is easily persuaded of the prejudice of the judge. Adverse rulings convince him of the fact, as shown by the case of *Burke v. Mayall*, 10 Minn., 287, (Gill 226). It seems to us, therefore, that this is the true rule; that such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as clearly show that there exists a prejudice on the part of the judge toward the defendant, and *unless* this prejudice thus *clearly* appears, a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a prima facie case only be shown—such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity, and of the clearness of his perceptions."

But, as will appear from the interpretation given section 550 in the consideration of the remaining question, the provision for filing an affidavit is not limited to cases in which all of the judges of the subdivision are disqualified.

It is contended that the affidavit is insufficient because it does not state the fact of bias, but merely that the affiant believes the judge has a bias; and further that it does not state any facts showing bias.

"An affidavit is a written declaration under oath made without notice to the opposite party."

Revised Statutes, sec. 5262.

It is the *fact* of interest or bias, set forth in an affidavit by a party or his counsel, that disqualifies, and not his belief. In proceedings in attachment, sec. 5522, Revised Statutes provides that the clerk shall make an order of attachment when there is filed in his office an affidavit of the plaintiff showing, among other matters, the existence of any one of the grounds of attachment. In *Coston v. Paige*, 9 Ohio St., 397, it is decided that,

"The ground for an attachment may be stated in the

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affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged''.

And in the following cases, that such an affidavit is insufficient when made merely on belief. *Dunlevy & Co. v. Schartz*, 17 Ohio St., 640; *Garner v. White*, 23 Ohio St., 192; *Endel v. Leibrock*, 33 Ohio St., 254. And as bearing on the question see, *Campbell v. Hall & Co.*, 1 Kas., 488; *Atchison v. Bartholow*, 4 Kas., 124; *Thompson v. Higginbotham*, 18 Kas., 42.

At common law, and in this state until a very recent date, only interest required a change of venue or disqualified a judge, and the facts upon which the interest arose had to be set out. *Knaggs v. Conant*, 2 Ohio 26; *State ex rel. v. Winget*, 37 Ohio St., 153.

The statute is very broad. The truth of the fact set out is not subject to inquiry, at least not in that case, and to hold that a party or his counsel can disqualify a judge to sit whenever he can bring himself to believe that the judge has a prejudice against him or a bias for his adversary, by making merely such a recusation, might be to open wide the door to very grave abuse. One case has come before us at this term in which a party and his counsel had come from a distance to be present at a trial, and in which on the morning the case was set for trial such an affidavit was filed. No provision is made for notice or for costs in case of continuance or to guard against abuse.

It is further contended that the filing of an affidavit was unauthorized because it does not appear that all of the judges of the subdivision were disqualified. The law of 1860, (57 O. L., 5) is not materially different from that of 1855, (53 O. L., 25), and was carried into the revision of 1880 as section 550. So much of it as is material to the question under consideration is as follows:

“In every instance where a judge of the court of common pleas is or shall be interested in the event of any

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cause, proceeding, motion, or matter pending before the said court, in any county of his district, \* \* \* on affidavit of either party to said cause, \* \* \* or his counsel, *showing* the fact of such interest, it shall be the duty of the clerk of said court to enter upon the docket thereof, an order directing that the papers and all matters belonging to said cause'' shall be transmitted to the clerk of the court of common pleas of an adjoining county of another subdivision, where practicable, of the same district; where not, then to an adjoining county of another district.''

It will be noticed that the section, as it then was, provided for a *change of venue* in every case where the fact of the interest of the judge is shown by the affidavit of either party or his counsel. In 1885, (82 O. L., 24) the section was amended to read:

''When a judge of the common pleas court is interested in any cause or matter pending before the court in any county of his district, *or is related to either or any party to such cause; or is otherwise disqualified* to sit in such a cause or matter, *and there is no other judge in the same subdivision who is not disqualified*, on affidavit of either party to such cause, or matter, or his counsel, showing'', etc.

Here is the first material change in the law. It will be noticed that not only does interest in a cause disqualify a judge to sit, but also relationship or any other disqualification that is shown by affidavit of a party. Another important change is that the venue is not to be changed in every instance an affidavit is filed, but only when no other judge in the same subdivision is not so disqualified. The clause ''and there is no other judge in the same subdivision who is not so disqualified,'' was not intended as a limitation of the cases in which an affidavit is authorized, but of the cases in which the venue is to be changed. Prior to this amendment every case, in which it was shown by affidavit that the judge had an interest, was to be taken out of his jurisdiction; by the amendment he is, by implication at

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least, disqualified to sit not only in cases in which he is shown by affidavit to have an interest, but in every case in which his interest, relationship or other disqualification is shown by affidavit of a party or his counsel, and some other judge of the subdivision, who is not so disqualified, is to sit, or, if there is none, the case is to be sent to another county. A mere transposition of the clause so that it will immediately precede the clause prescribing the duty of the clerk will make plain the legislative intent.

This fault in the frame work of the section has been, as we shall see, carried in the amendments into the section in its present form.

Another source of confusion is that the section does not in express terms, as does the section in relation to judges of the circuit court, disqualify the judge, but does so only by necessary implication. The reason is that originally the statute in every case provided for a change of venue, so that it was not necessary to declare the judge disqualified, and, instead of redrafting the section and in express terms disqualifying the judge, the section has been from time to time amended until now it in no instance provides for a change of venue, but only for a judge who is not disqualified.

The section was again amended in 1887 (84 O. L., 129), so that interest in the event of the cause was the only ground of disqualification. In 1888, (85 O. L., 267), the section as it was in 1885, was restored verbatim et literatim. In 1889, (86 O. L., 363), the section was again amended and as so amended, is still in force. It is as follows:

“Section 550. When a judge of the common pleas court is interested in any cause or matter pending before the court in any county of his district. or is related to, or has a bias or prejudice either for or against, either or any party to such cause, or is otherwise disqualified to sit in such cause or matter, and there is no other judge in the same subdivision who is not so disqualified, on the filing of an affidavit

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of either or any party to such cause or matter, or of his or her counsel, setting forth the fact of such interest, bias or prejudice or disqualification, the clerk of the court shall enter the fact of the filing of such affidavit on the trial docket in such case, and forthwith notify the supervising judge or if he be disqualified as aforesaid, a judge of some other subdivision who is qualified, of the district, who shall proceed in the same manner as provided in section 469, of the Revised Statutes of Ohio, to designate and assign some other judge of the district not so as aforesaid disqualified, to hold the court and try the cause where the same is pending; and it shall thereupon be the duty of the judge so assigned, to proceed and try such cause."

Previous to this amendment the section provided that on affidavit *showing* the fact of interest the clerk should act. Whether or not it was then necessary to state the facts which showed the fact of interest it is not necessary to consider, for now it is sufficient to file an affidavit *setting forth* the fact of such interest, bias, etc.; that is, aver such interest, bias, etc. And when such an affidavit is filed the duties of the clerk are ministerial, and not judicial, see *State v. Shaw*, 43 Ohio St., 324, and he should enter the fact of the filing on the trial docket, and thereupon the judge is disqualified to sit in such cause or matter, and if there is no other judge in the same subdivision who is not so disqualified, the clerk should forthwith notify the supervising judge, or, if he be so disqualified, a judge of some other subdivision of the district who is qualified.

The affidavit not setting forth the *fact* of bias or prejudice, but merely the defendant's belief of such fact, was insufficient to disqualify the judge, and there was no error in his sitting in the trial of the case. But the judgment must be reversed for error in overruling the demurrer to the amended petition, and said demurrer is sustained and the

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cause remanded to the court of common pleas for such further proceedings as may be authorized by law.

*John Logan*, for Plaintiff in Error.

*Humphrey Jones*, for Defendant in Error.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before King, Haynes and Parker, JJ.

THE KILBOURNE & JACOBS MANUFACTURING CO. v.  
NATHANIEL P. GLANN et al.

*Bond of contractor for government work—Obligation to pay for "materials" used in the work—Scrapers not "materials" within meaning of bond.*

The provision in a bond given by a contractor for work to be done for the U. S. Government, whereby he is bound to "make full payment to all persons supplying him labor or materials in the prosecution of the work," does not cover scrapers or any other tools or implements furnished such contractor for the performance of the work.

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HAYNES, J.

This action was brought in the court of common pleas by the Kilbourne & Jacobs Manufacturing Co. against Nathaniel P. Glann as principal, and H. P. Glann and William G. Gardinier, as sureties, upon a bond that had been entered into by Nathaniel P. Glann with one N. L. Roberts, First Lieutenant of the Nineteenth Infantry, acting assistant quartermaster of the United States. The original agreement was that Nathaniel P. Glann was to fill the river front at Fort Wayne, Mich.; to furnish and lay drain tile, and furnish and put in earth from outside of the reservation, all in accordance with the plans and profiles on file in the office of the constructing quartermaster. The United States require that there should be a bond given, and in pursuance of that a bond was given, as I have stated. So far as this case is concerned, that portion of the bond that is material

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is this: "That the said Glann shall make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract."

The plaintiff says further—

"That on the 3d day of September, 1896, it sold and delivered to said defendant Nathaniel P. Glann, 24 square bowl wheel scrapers at the price of \$35 each, and for the total sum of \$840. That said scrapers were purchased by said defendant for the express purpose of being used, and were used, in the performance and prosecution of the work agreed to be done by him under the contract with the United States aforesaid. The plaintiff says that the said defendant has not paid the purchase price of said scrapers, nor any part thereof, although frequently requested by the plaintiff to do so."

Therefore he brings his suit, and asks judgment for \$840.

A demurrer was interposed to that petition by the defendants, and that demurrer was sustained, and the plaintiff not desiring to plead further, judgment was entered upon the demurrer in favor of the sureties in the case.

The question argued here, and the real question in the case is, whether or not these scrapers come within the designation of "materials" that were furnished in the prosecution of the work. No authorities are cited by counsel for plaintiff in error supporting his position that they are materials, although he says that he has been informed that there are certain decisions of courts of the United States that would sustain that position, but he has been unable to find those cases. In the brief that he has filed the cases cited largely go to support the position that plaintiff had the right to bring this suit upon this bond directly, upon which there is no question made here. Then he cites a case in 14 Pac. Rep. 466—Parkinson v. Alexander—wherein the supreme court of Kansas say:

"Under the statute, laborers and material men furnishing work or materials in the construction of a railroad, are so

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protected that they may recover against the obligors on the bond, where a bond is given by the contractor in pursuance of the statute, or against the railroad company where no bond is given, for everything furnished by them which goes into the construction of the railroad, whether such laborers and material men are employed by the contractor or by a sub-contractor; but persons furnishing only provisions or goods which do not go into the construction of the railroad, are not so protected, unless such goods or provisions are furnished to the contractor himself."

That seemed to throw a little confusion into the case, but we have got now the case itself. It is found reported in 37 Ks. page 110. Turning to the statute of that state, it provides that—

"Whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and material men, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work, etc."

The action was brought by men who had furnished goods to the sub-contractor or to the men employed by the sub-contractor, to be applied on the amount that was coming to these men for their work, the sub-contractor charging up these goods as so much money paid to the workmen. The court held in that case that these goods so furnished did not come within the statute, nor were they materials furnished for the construction of the railroad. To that extent the case is against the position taken by the plaintiff. In the case at bar we are clearly of the opinion that the word "materials" does not cover the scrapers in question any more than it would cover the mules or horses that drew them, or any other tools or implements that were used in making the excavation or filling that was there made. They



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are not materials which went into the construction of the work, or that were used in the prosecution of the work. For this reason we sustain the judgment of the court of common pleas, and the judgment will therefore be affirmed at the costs of plaintiff in error.

*E. W. Tolerton*, for Plaintiff in Error.

*R. R. Kinkade*, for Defendant in Error.

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(Eighth Circuit—Lorain Co., O., Circuit Court—Oct. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

S. R. PENFIELD & E. J. GOODRICH v. EMMA J. MASON.

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*Partnership—Note by one partner in firm name—Liability of co-partners—*

Where one partner, to secure his individual debt, or the debt of an outsider, uses the name of the firm without authority from his co-partners, under such circumstances that the payee has actual or constructive notice that the firm name was so used not for the benefit or for the business of the firm, to hold the other partners liable, the burden is on the payee to show that such other partners assented either before or after the execution or endorsement of the note or bill, and that the firm name was used either with their approval, or that they afterwards ratified it.

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Error to the Court of Common Pleas of Lorain county.

MARVIN, J.

The case of L. R. Penfield and E. J. Goodrich against Emma J. Mason, is here for the second time upon a petition in error. At a former term a petition in error was filed by the present defendant in error.

The suit was brought in the court of common pleas by Mrs. Emma J. Mason against L. R. Penfield and E. J. Goodrich upon a promissory note, dated at Hillsdale, Michigan, on the 28th of January, 1887, calling for the payment of \$600.00, with interest at eight per cent. in one month from date.

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Both defendants set up that the note is barred by the statute of limitations, or rather that the action is barred because of the statute of Michigan, which provides that suit upon a contract not under seal shall be brought within six years after the cause of action arose, and our statute provides that when an action would be barred in the state in which the action arose it is to be barred in our own state.

If this were the first suit brought upon this note, there would be no question that the action would be barred; because this suit was brought on the 25th day of October, 1895; but when this action was before the court at the former term, the question was raised, and we held that because of an action brought in 1892, by Mason upon this note, which was dismissed by the court for want of prosecution and not upon the merits, and dismissed after the period of six years from the time the cause of action arose, and that this suit was brought within one year thereafter, that under the provision of our statute it was not barred. But it is said in this case that no proper evidence was introduced to show that the first action was not brought within the time fixed by the statute of Michigan.

The evidence on this subject is found on the 99th page of the bill of exceptions, and is simply a copy of the petition, which was filed in the case that is said to have been brought in 1892, together with a copy of the journal entry that was made in the case.

Mr. E. G. Johnson, who represented the defendants in the action, made this admission "I will admit that the paper offered by counsel for plaintiff in this case (and that was the petition filed), was filed in this court in case No. 3627 of Emma J. Mason against E. J. Goodrich and others, and it was filed at the time it bears date". The objection made is, that this does not establish that the action was commenced.

The journal of the court offered in evidence shows that

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the petition thus filed was afterwards dismissed by the court for want of prosecution without prejudice to a new action.

No evidence was introduced to show that a summons was issued upon this, but it is admitted this petition was filed in the court of common pleas of this county. The petition is here introduced, and shows it was upon this note and against these defendants; it is admitted it was filed in that case. We think that the evidence is sufficient to show, in the absence of any thing to the contrary, that the action was commenced within the time; so we adhere to the ruling of the court at the former hearing in this court, although at that time the question of whether this was sufficient evidence that that action was commenced was not raised.

An examination of the record shows that a good many objections were made and a good many exceptions were taken to the introduction of evidence, notably on the cross-examination of Mrs. Mason.

In addition to the defense of the statute of limitations, the defendant Goodrich claims that the note was given by Penfield alone. Goodrich and Penfield were partners doing a retail business at Hillsdale, Michigan, Goodrich living in Ohio, in this county. He did not spend his time at Hillsdale. Penfield spent his time at Hillsdale. Goodrich says that Penfield gave the note and signed the name of the firm "Penfield & Goodrich" for a debt in which he, Goodrich, had no interest; in which the firm of Penfield & Goodrich had no interest. That Mason, the payee, the plaintiff below in this action, knew of that fact, and that hence he is not liable upon the note.

Upon the examination of Mrs. Mason it was sought to show that she knew that the note was given in payment of a debt owing by her son-in-law Allen to a Mr. Stebbens of Chicago. The court excluded the evidence, ruling that the questions put were not proper, and it is manifest that the court did that upon the ground that it was not a proper

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cross-examination of Mrs. Mason; that it was going into the defendant's case, because when Allen was upon the stand, he was permitted to testify to conversations, the same conversations that were asked about of Mrs. Mason, and Allen was permitted to tell all about it. There was no error in the ruling of the court upon the question. Nor do we find that in any of the rulings upon the evidence there was any error to the prejudice of the plaintiffs in error, or either of them.

The court allowed evidence to be given to show that the note was given for money furnished to Penfield by Mrs. Mason; that the money thus obtained from Mrs. Mason was used in the payment of a debt to Stebbens; that the debt to Stebbens was evidenced by promissory notes signed by Penfield & Goodrich. That the indebtedness to Stebbens accrued on account of a certain publication sold by Stebbens, called "Cram's Atlas". The evidence shows that Allen was engaged in the selling of this atlas in the state of Michigan. That Stebbens, who was either the publisher or the wholesale dealer, I believe the publisher of the atlas, would not sell to Allen upon his credit, and that Allen made an arrangement with Penfield by which Penfield should order the atlases, and Penfield should have a commission of five per cent. upon such as Allen should sell.

Allen in his testimony says that he don't remember that that arrangement of paying five per cent. commission was made; he says so in this record, but Penfield says it was; so that the jury were justified in believing that it was agreed upon.

Now, when th's case was before this court at the former hearing, in the opinion then delivered it was said that under the evidence, the indebtedness to Stebbens was an indebtedness of the firm of Penfield & Goodrich; that was said by this court upon the same evidence which is found in the present record.

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Penfield & Goodrich were engaged in the book business, the selling of books at Hillsdale. Here was the publication of an atlas. It is true Mr. Goodrich testifies that the atlas was not sold in book stores, and upon cross-examination he knows that because he is in the book trade, and had not been able to get Cram's Atlas to sell after some correspondence; but we still think, as announced in the opinion before, that if Penfield went into the business of dealing in books of a particular kind at Hillsdale without letting his partner know that he was engaged in the selling of that book, to-wit: Cram's Atlas, but he was engaged in that business to the extent that he was having the books bought on the credit of Penfield & Goodrich, and evidencing the indebtedness for the books by the notes of Penfield & Goodrich, and receiving a commission for the publication thus furnished, that Goodrich would be entitled to his proportionate share of that five per cent. and that it was the business of Penfield & Goodrich.

We do not believe that Penfield could prevent Goodrich from having an interest in the sale of books at their store in Hillsdale; that he could say this publication I will call my own individual matter. I will have the work shipped to Penfield & Goodrich; I will have the firm of Penfield & Goodrich order, and have the books paid for by their notes; but I will take the profit of that publication, and Goodrich shall have no part of it. We still think this business belonged to the firm of Penfield & Goodrich, and in this connection I may as well speak of the language that was used by the court in its charge, without stopping to read it all. The substance of it was, that he had permitted evidence of the dealings of Penfield and Stebbens to be introduced, but that whatever the character of the notes given by Penfield & Goodrich to Stebbens was, whether it was an indebtedness of Penfield & Goodrich or not, was a matter with which they had no concern.

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That is the substance of what the court said. We think that whether this instruction was proper or not, it was not to the prejudice of either Penfield or Goodrich, under the view we take of the case that this was the business of Penfield & Goodrich.

If we are right in the proposition that this indebtedness to Stebbens was the indebtedness of Penfield & Goodrich, and the money borrowed from Mason was used to pay that debt, then neither Penfield or Goodrich suffered by this charge.

The court said to the jury that a note given, signed with the firm name, and given by one of the partners, *prima facie* was the indebtedness of the co-partnership, and that the party taking such note, even though it were given for an individual indebtedness of the partner who signed the name, still, unless the party accepting the note had actual or constructive notice, (the court defined what was meant by constructive notice properly), that it was not for the business of the firm, then the firm would be bound by such note.

And the court said further, that the burden of showing that the payee of the note or the holder of the note had such notice, actual or constructive, that the note was not given for a debt of the firm, was upon the defendant undertaking to defend on that ground.

This is urged upon us as error, and we are cited to the text and notes in the 17th Am. & E. Enc. of Law, at pages 1024 and 5, where this language is used.

“The signature or indorsement of the name of a firm upon a bill or note is presumed to constitute a joint obligation incurred in good faith and in the regular course of business, the burden of proof resting with the partners to establish the contrary; but upon the establishment of the fact that the obligation was given by the signing partner to pay an individual debt, or to obtain a loan for himself, or as an accommodation or security for others, or for a pur-

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pose outside of the scope of the business, or for other unauthorized or illegal purpose, the burden is shifted, and it then rests with the holder to establish that the partners either authorized or subsequently ratified its issue''.

A large number of authorities are cited to that proposition in this work; quite a number of those are valuable and we have examined them. But it will be noticed that the matter here spoken of is where the note is given to pay a debt of the partner who signs the note, or as accommodation or surety for others, or purposes outside of the scope of business, or for some unauthorized or illegal purpose.

One of the cases cited in the notes referred to is found in 5th Connecticut, page 574. The case is that of the New York Firemen's Insurance Co. v. Bennett and others. That is one of the authorities cited in support of the proposition which I have just read from the Encyclopedia. I read from the syllabus:

''Though the indorsement of a note, by one of the several partners, in the partnership name, for his individual purpose, without the consent or knowledge of the other partners, will, after the security has passed into the hands of a bona fide holder, bind the firm; yet an indorsee, who, at the time of receiving such security, did not know, but was ignorant through gross negligence, that it was indorsed under such circumstances, cannot avail himself of it to subject the firm. The indorsement of a note by one of several partners, in the partnership name, as surety for a third person, without the consent or knowledge of the other partners, will not bind the firm; and the burden of proving the authority of the partner so using the partnership name, lies on the creditor or holder of the note.

''Therefore, where A. B. and C. were partners, doing business in the city of New York, where A. resided, and in Fredericksburgh in Virginia, where B. and C. resided; and A. indorsed a note in New York, in the partnership name, without the consent or knowledge of B. and C., as the mere surety of D. a third person, for a debt previously due from D. to the indorsee, the partnership having no interest in

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the transaction; in an action by the indorsee, against all the partners as indorsers, it was held, that the plaintiff could not recover, although the jury should find, that he had no knowledge, express or implied, of A's. want of authority."

Now an examination of that case will show that the indorsee was a creditor of D, and that the circumstances were such that a prudent man would have inquired into how it came that the partnership name was used here as indorser of that note to secure the debt of still another firm. I will read from the text here.

"By long established law, originating in the custom of merchants, a contract by one partner, having the appearance of being in behalf of the firm, is considered as being obligatory on the partnership. Whenever a bill is drawn, accepted or indorsed, by one of the several partners, during the partnership existence, and in behalf of the firm, and it gets into the hands of a bona fide holder, the partners are liable, though in truth the partner negotiated the bill without the consent of the partners, and for his own peculiar benefit. But, in respect of a person, who, at the time of receiving the bill, knew or had reason to believe, that the partner negotiated it for his individual advantage, and without the concurrence of his associates, the bill is entirely unavailable."

Now the court in the opinion held in substance this, and an examination of the language used in the Encyclopedia, it seems to me shows that the text writer meant this, where there is a debt owing by one of the partners, or where one of the partners for the purpose of securing the debt of some outsider, uses the name of the firm without authority, or rather uses it under such circumstances that the payee has actual or constructive notice that the firm name was so used for the benefit of the firm or the business of the firm. then in order to hold the partners who did not make use of the name, I mean partners other than he who signed the name, in order to hold the other partners, the burden is upon the credit-



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ors to show that they assented either before or after the making of the note, or the indorsement of the bill, that it was done either with their approval or that they thereafter with knowledge ratified it. But the burden is upon the creditor to show that.

An examination of every case cited and of some which are not cited in that text we think establishes the proposition that the party to whom a note is given or who is in any way a bona fide holder of the paper, is entitled to recover where it is apparently in the partnership business and there is no notice to him that it is not in the partnership business, and that these other cases establish that the burden is upon the party who seeks to show that there was notice.

In the case in the 5th Connecticut, to which attention has been called, the opinion contains a very full discussion of the rights of partners to bind the firm, and of the circumstances under which a partner may be relieved. To the same effect is the case of *Heffron v. Honaford*, 40th Mich., 305. The case of *Sebor v. Armstrong*, 3 Pickering, page 5. The case of *Hommell v. Ganewell*, 5th Blackford, page 210. Authorities cited in these cases fully justify as we think the charge of the court upon the proposition which has been discussed, and the charge of the court as given; which I will not stop to read, in which the court used language as to the right of a creditor who receives a partnership note to collect upon it where it is received in good faith and without any notice, actual or constructive, that it is not the note of the firm.

And this disposes of the requests made by the defendant which were refused, which I will not stop to read, but which, if the law is as I have stated, as we understand it to be, the court properly refused. We find no error in the case for which it should be reversed, and the judgment is affirmed.

*E. G. Johnson and W. B. Bedortha*, for Plaintiffs in Error.

*Ben. W. Johnson and N. L. Johnson*, for Defendant in Error.

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Baldwin v. Curth.

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(Eighth Circuit—Lorain Co., O., Circuit Court—Oct. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

JOSEPH H. BALDWIN v. S. CURTH.

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*Lease of land on shares—Growing crops at termination of term—  
Rights of parties—*

(1.) Where land is rented for a term, on shares, with the provision that the tenant should be entitled to his share from crops put in by him and growing at the time of the termination of the lease, the lessor, having entered into possession of the land at the termination of the lease, has no right to plow up a growing wheat field put in by the tenant before the termination of the lease, and his doing so is trespass, for which he is liable in damages.

*Same—Computation of lessor's one-third—*

(2.) In the computation of the value of the lessor's one-third share in the growing crops, the fact that the lessee will be at the expense of cutting and threshing the wheat in harvesting the same, must be considered.

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Error to the Court of Common Pleas of Lorain county.

MARVIN, J.

The case of Joseph H. Baldwin v. S. Curth is a proceeding in error, seeking to reverse the judgment of the court of common pleas; and the case grows out of this state of facts:

Curth brought suit in the court of common pleas, setting out that he leased from Baldwin a farm for a period of two years from the first of April, 1893. A copy of that lease is attached to the petition, and among the provisions in the lease is that certain wheat which was on the ground at the time the term granted by the lease began, should belong to the lessor, Baldwin, who should have a right to take it off, and if Curth, the lessee, should leave any wheat growing upon the ground at the end of his term, which would be the first of April, 1895, he should have the right to harvest it, giving to Baldwin the share which under the custom of the community, the land owner would be entitled to if the wheat was raised upon shares, and the division should be made to

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Baldwin v. Curth.

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him, to be measured by the bushel. He says that he did leave twenty-seven acres of wheat growing upon the land when his term ended on the 1st of April, 1895—wheat which was sown in the fall of 1894, to be harvested in 1895; that Baldwin shortly thereafter entered upon the premises and plowed up and destroyed twelve acres of this wheat to the damage of Curth and in violation of his rights. Baldwin answers, admitting that the lease was made, admitting that he plowed up some wheat put in by Curth, but says the amount is less by an acre than that complained of; but he says the reason why he did this is because Curth put in more wheat than he had a right to, and that he had destroyed a meadow which he had no right to destroy.

The lease provided that the farming must be done in a proper manner, according to the rules of good husbandry. He says Curth did not carry out that provision of the lease, and he files with his answer a cross-petition in which he says that Curth cut down and destroyed three maple trees of considerable value, for which Baldwin should have pay from Curth; that he destroyed a meadow by turning cattle upon it, after Baldwin had seeded it properly to grass, and that he destroyed it; that he permitted certain fence posts to be washed away by high water and that he should pay for these, thus charging Curth with waste in these several ways, and he asks a judgment against Curth.

The case was tried to a jury, and the jury returned a verdict for the plaintiff in the sum of \$98 and some cents. There was submitted to the jury, at the request of the plaintiff, certain interrogatories which were answered. Attention is called to these, because of the fact that some of the law questions are affected by the answers to these questions. (I ought to say a reply was filed to this answer and an answer to this cross-petition, in which the plaintiff says it is true that he cut down three trees, but he says he cut them down with the knowledge and consent of the defendant.)

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The lease provided that Curth should have his fire-wood from off the premises, but that he should not cut down growing trees or timber except by special permission of Baldwin.

The first of the interrogatories propounded to the jury upon which they were specially to find, reads: "Did the plaintiff cut down the three trees with the knowledge and consent of the defendant"? And the jury answered "Yes".

Second: "Is the plaintiff indebted to the defendant on account of any of the claims set forth in the cross-petition of the defendant"? To which the jury answered "No".

Third: "If the plaintiff is indebted to the defendant on account of any of the claims set up in the cross-petition, etc." Of course, there was no occasion to answer this, because the jury had already answered that the plaintiff was not indebted to the defendant on account of any of the claims set up in such cross-petition.

An objection was made upon the trial of this case to the introduction of any evidence under the petition. The claim is that no cause of action was set out in the petition. The theory upon which that claim is made is, that this is substantially an action of trespass; that the petition shows that Baldwin was entitled to this land which he plowed, and was entitled to its possession in 1895 and that therefore he could not be held for a trespass upon such land; that the damages which Curth seeks to recover are simply an incident of that trespass, and unless an action for trespass can be maintained, he cannot recover for such incidental damages.

The case of Brown and others against Lake, found in the 29th of the Ohio State Reports, at page 64, is relied on to sustain the proposition that the action cannot be maintained.

The syllabus reads:

"In an action to recover damages for unlawfully breaking and entering the dwelling house of the plain-

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Baldwin v. Curth.

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tiff and removing the roof therefrom, whereby the property and family of the plaintiff were exposed to the inclemency of the weather, and the plaintiff became sick, Held: That if the plaintiff fails to prove the trespass, no recovery can be had on account of any of the alleged consequential damages''.

In that case the suit was brought by a party who was in the occupation of a certain dwelling house, and the suit was against the defendant for going upon the premises and removing the roof for the purpose of making repairs, and for injury to the health of the plaintiff, resulting from the inclemency of the weather which came in, by reason of the removal of the roof. On the trial it turned out that the defendant had a perfect right to enter upon the premises; they were his, and plaintiff had no right there, and the court held that since there was no trespass that could be maintained, no recovery could be had for the injury to the plaintiff's health.

We think there is a clear case here of trespass under the decision in the case of Wilber v. Paine, 1st Ohio Reports 251. Attention is called here in the argument to Swan's Treatise, 15th Edition, pages 825 and 826. An examination of these pages seems to establish that Baldwin was a trespasser if the averments of this petition be true, for although the term ended in April, 1895, the party who put in the crop had a right to protect the crop and harvest it, and may maintain trespass against the owner for coming in upon it. We think the ruling of the court that evidence could be introduced under this petition was right.

While the plaintiff was upon the witness stand, he was asked what was the fair market value of this growing wheat which was destroyed by Baldwin. An objection was made that he had not qualified—he had not shown that he was prepared to give an answer that would be of any value. It

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was shown that it is only an occasional thing that wheat is sold, growing wheat, by the acre, although some times sold by administrators of estates of deceased persons, and perhaps by others occasionally. The plaintiff, it seems, had purchased two fields of growing wheat. The purchase was all made at one time. It was in Ashland county, some years since, but he was a farmer, had been farming on his own account for ten years, and had that much knowledge of the value of growing wheat. We think it was not error to allow him to testify as to the value. It might not be of very great aid to the jury, but he had some knowledge better than a man who knew nothing of farming; better than a man who never made a purchase, or knew of a sale or purchase, of wheat upon the ground—growing wheat, by the acre, and we do not think there was any error in allowing that question to be answered.

The defendant put upon the witness stand Lawson. Taylor, and he was being examined with a view to showing that the management of the farm by Curth had not been such as good husbandry would require. That he did not properly farm the land, and that it was bad husbandry to have destroyed the meadow that it was alleged had been destroyed—plowed up for the purpose of putting in this wheat, and Taylor was asked about the character of that meadow, for this wheat was grown upon land which had once been a meadow. He was finally asked the question, "How much hay was cut to the acre upon that meadow when Riden occupied the farm?" Riden had been a tenant of Baldwin upon this farm, and it was in the summer of 1892 that Riden cut this hay. As this land was plowed up for wheat in 1894, it would seem somewhat remote to undertake to show that it was bad husbandry to plow up a meadow in 1894, which had produced a crop of grass in 1892, and which the defendant proposed to show by Taylor was a ton and a half to the acre. We think there was no error in excluding that.

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Baldwin v. Curth.

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When Baldwin himself was upon the stand, he was asked whether the plowing up of this meadow land was in accordance with good husbandry. An objection was made by the plaintiff, and that objection was sustained and an exception taken, but no statement was made as to what the answer of Baldwin would have been. For ought that appears he may have said it was in accordance with good husbandry. We cannot say that there was error to the prejudice of Baldwin in this ruling of the court. We do not know what his answer would have been except as we may infer that a lawyer is not expected to ask a question the answer to which will prejudice his case, though it has sometimes been done.

The court charged the jury, and the only exception taken to the charge was to the refusal of the court to charge as requested by the defendant. There were two requests made to charge, one of them was:

“If you find from the evidence that the plaintiff did not leave the rented premises of the defendant in as good condition as they were in at the time he took possession thereof, the natural wear and tear excepted, then you may inquire whether he so left them through malice or ill will; if you find from the evidence he did, you may go further than mere pecuniary damages and give the defendant exemplary damages, that is, such damages as will be an example, and in that you may include a reasonable attorney fee”.

This the court refused, but the jury found specially that the defendant was not entitled to recover on any of the things set up in his cross-petition, so whether that ought to have been given or not there was no prejudice; because the jury found there was no wrong doing on the part of the plaintiff, there surely was no malice; therefore there was no error to Baldwin's prejudice in refusing to give this request.

The other request I will not stop to read; it is long. The substance of it is, if you find that the plaintiff had not

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properly farmed that land and had not left the feed on the farm that good husbandry would require, and the like, and that in order to restore the farm to as good condition of husbandry as when the plaintiff took possession and that to provide a proper amount of feed and support for stock it became necessary to plow up this wheat, the defendant had a right to plow it up and the plaintiff could not recover. We do not suppose that one may go and destroy the property of another in such a way as this, go and plow up his crop of wheat because he hasn't farmed the land as it ought to have been farmed, and without reference to how valuable the wheat is as compared with the injury that has been done. That is not the way for a man to right his wrongs; the court properly refused to charge this request.

And one other objection urged is, that the damages are excessive. The damages are, as found by the jury, ninety-eight dollars and some cents, and the claim is made that the jury made a mistake in this, since Baldwin was to have one-third of the wheat; for they say that that would be the share that Baldwin would be entitled to under the custom of the community; since he is to have one-third, leaving Curth two-thirds; that it would be a mistake to allow Curth the value of the entire two-thirds as it stands upon the land, and I think that that is true. If there were twelve acres of wheat growing, and each acre was of equal value, so that one-third of that set off to Baldwin would have been his share, and each acre was worth ten dollars, Baldwin's four acres would be worth more than ten dollars an acre, because he is to have his cut and thrashed at the expense of Curth. So that if an estimate was made by saying that is worth \$12.00 an acre, and there were twelve acres, and Curth's interest in it is two-thirds, they made a mistake; it would not be two-thirds, for he would have to pay for Baldwin's whatever was necessary to get his into the bushel.

Baldwin's was worth more than one-third of the wheat as



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it stood upon the ground, for Curth was to be at the expense of cutting and harvesting his own and also at the expense of cutting and harvesting that of Baldwin. The testimony is that the expense of that would be in the neighborhood of three dollars an acre. Although there is a dispute as to how much there is of this, and there is a dispute as to the value, yet there is testimony to justify the jury, if they believed it, in finding it was worth \$12.00 an acre, and there were twelve acres; if that is so, it would be worth \$144.00. Then Baldwin's share would be worth \$48.00. In addition to that, Baldwin's share would be worth what it would cost to cut and harvest it. This at \$3.00 per acre would give Baldwin \$48.00 plus \$12.00, and there would remain for Curth \$144.00 less \$60.00, which would be \$84.00, and the interest computed on that from the time the injury is said to have been committed up to the time when the case was heard, was \$15.12, that would have been \$99.12, and the jury found \$98.00, so that making the computation in the way I think it should be made and the way it is claimed, still the evidence is such we cannot say the damages are excessive, and the judgment is affirmed.

*Judge Kelley and C. W. Johnson, for Plaintiff in Error.*

*H. G. Redington, for Defendant in Error.*

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(Fourth Circuit—Pickaway Co. O. Circuit Court—Nov. Term, 1898.)

Before Cherrington Russell and Sibley, JJ.

EMERSON GOULD v. GEORGE B. ROSE.

*Service of Process—Return on duplicate writ proper—Secs. 5041 & 5042, R. S.*

Personal service, by the sheriff or his deputy, of the original writ of summons upon a defendant, and the proper return thereof made by such officer on a duplicate writ issued by the clerk of the court, is a substantial compliance with sections 5041 & 5042, Revised Statutes, and is a valid service.

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Gould v. Rose.

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RUSSELL, J.

A petition was filed, in the court of common pleas of Pickaway county, upon which a summons was duly issued with the proper indorsements thereon by the clerk of the court and delivered to the sheriff. The defendant, though not a resident of, was found within that county, and the original writ was served by delivering the same to him personally, by the deputy sheriff, in whose hands the sheriff had placed the writ for service. A duplicate of the original summons was then procured to be issued by the clerk, and upon this writ, the deputy made return that he had "served the same by personally handing a true copy thereof, with all the indorsements thereon, to the within named George B. Rose", within the proper time for service and return.

Thereupon the defendant, by his attorneys, filed a motion in said cause, (alleging therein that he appeared for that purpose only) to quash the service, and to set aside the return thereof, and with said motion he also filed his affidavit, setting forth, in substance, the facts as above stated, and attached to his affidavit the original summons which had been served upon him. Upon the hearing of the motion the defendant called as witness the sheriff and his deputy, and also the clerk whose testimony was in accord with the foregoing facts. It also appeared in evidence, that the sheriff received the writ from the clerk and had indorsed thereon the appointment of a third person to serve the same in pursuance of section 5041, but the same being served by him, the indorsement was stricken off the writ by the sheriff before delivering it to his deputy. The defendant did not appear as a witness on the hearing of the motion. It also appeared in evidence, that a copy of the original summons had been made by the sheriff, but could not be found at the time of delivering the original to the deputy, and in the deputy's haste to make the service while the defendant

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Gould v. Rose.

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was in the county, and for want of time to prepare another copy, he served the original, as stated.

Objection was made by plaintiff's counsel to the testimony of the officers, which tended to impeach the return made by the sheriff. The court sustained the motion of the defendant, quashed the service, and set aside the return made by the deputy, to which plaintiff excepted and filed his motion for a new trial, which was overruled, and the plaintiff thereupon prosecuted error to the circuit court.

Upon the hearing of the petition in error, the circuit court reversed the judgment upon the following grounds:

First. The judgment of said court below was manifestly against the weight of the evidence.

Second. Said court erred in setting aside the service made upon the defendant in error.

Third. Said court erred in quashing the service of the summons in this case.

Fourth. Said court erred in overruling the motion of the plaintiff for a new trial.

(A petition in error has been filed by the defendant in the supreme court.)

*Abernethy & Folsom*, for Plaintiff, Gould.

*Geo. B. Bitzer and Jno. C. Entrekin*, for Defendant, Rose.

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Snyder v. Wanamaker.

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(Fourth Circuit—Pickaway Co. O., Circuit Court—Nov. Term, 1898.)

Before Cherrington, Russell and Sibley, JJ.

**FREDERICK SNYDER v. LUCINDIA WANAMAKER.**

*Bill of exceptions—Review of order of trial court to set aside settlement of cause—*

Upon an order of the common pleas court in setting aside the settlement of a cause pending in said court, upon evidence, in order to bring before the circuit court the evidence for review, it is necessary that a motion for a new trial should be filed and overruled in the court below and a bill of exceptions taken containing the evidence.

**RUSSELL, J.**

Wanamaker commenced an action against Snyder in the common pleas court, in which issues were joined. Pending the action, Snyder procured a settlement to be made and an entry, dismissing the case. Subsequently, at the same term in which the entry of dismissal was made, Wanamaker filed a motion to set aside the settlement and the entry thereof, on the ground that the settlement was procured by fraud and misrepresentation. The motion was heard on affidavits as well as upon parol testimony, and on consideration thereof, was sustained. Snyder excepted and took a bill of exceptions containing all the testimony, including the affidavits, but did not file a motion to set aside the order of the court vacating the settlement, and for a new trial, and thereupon filed a petition in error to the circuit court, alleging, among other grounds of error, that the order of the court, in setting the settlement aside, was against the evidence.

On the hearing of the petition in error in the circuit court, defendant in error objected to the court considering the alleged error above stated, for the reason that in order to bring the evidence before the court for review, it was necessary that a motion for a new trial should have been made in the court below and overruled, and moved that the bill of exceptions be stricken from the petition in error. Objection and motion sustained.

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The North British & Mercantile Insurance Co. v. Cohn.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Oct. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. HARRIS COHN.

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*Insurance of several distinct items of chattel property in one policy—Entire contract, cannot be split up in several suits—*

- (1). Where several items of personal property are insured in one policy the amount of insurance for each being severally stated, yet it is one contract of insurance, and where loss occurs, several suits to recover the insurance for each item can not be maintained. A suit on one item insured in such policy, is a bar to other suits for the other items.

*Same—*

- (2). Where suit is brought in the common pleas under such policy to recover the insurance for one of the items insured therein, and subsequently another suit is brought before a J. P. to recover the insurance for another item insured therein, in which latter suit a judgment is recovered first, such judgment recovered before the J. P. will be a bar to the action pending in the common pleas.
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Error to the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

In the case of The North British & Mercantile Insurance Company against Harris Cohn, the suit was brought in the Court of Common Pleas by Harris Cohn against the plaintiff in error here, the insurance company, based upon this state of facts:

On the 13th of March, 1894, the insurance company issued a policy of insurance upon the property of the defendant in error, the plaintiff below, covering various items of property, and the policy which is attached to the petition as an exhibit shows that there were four items of property specified in the policy: first, on a stock of merchandise upon which there was an insurance of \$750.00. Then there were three other items: a button-hole machine on which there was an insurance of \$75.00; a sewing machine, \$20.00; store furniture and fixtures, \$30.00. The aggregate of the indemnity provided for in the policy is \$875.00.

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There were other insurances permitted by the terms of this policy upon the same property, and other insurance was taken out. On the 21st day of March, 1894, a fire occurred by which some of this property was destroyed and the balance greatly injured, and the suit below was brought to recover for the damage sustained by Cohn by reason of this fire and, as claimed, provided to be paid by this policy of insurance.

To the petition the insurance company set up a number of defenses, one of which only was urged here, and that was the fourth defense set up in the answer. This defense sets up that on the 10th day of July, 1894, Cohn brought a suit before a justice of the peace against the insurance company for the loss occurring at this same fire, by the destruction of certain of the property covered by this same policy of insurance, but not for the same item for which this suit was brought. In that action he recovered judgment for \$30.00 and costs. That judgment has since been paid. That action is set up as a bar to the action to reverse which this proceeding is brought. This suit was brought on the 7th day of July, 1894, in the court of common pleas; as has already been said, the suit before the justice of the peace was brought subsequent to that time. The suit was brought before the justice of the peace on the 10th of July, and a judgment recovered on the 16th of July. The court of common pleas was asked to charge the jury that the suit before the justice of the peace was a bar to this suit. This the court refused to do, but did charge the jury that it was not a bar. Unless there was error in the action of the court in refusing to charge that the suit before the justice of the peace was a bar, and in charging it was not a bar, then this case is not to be reversed. If there was error in such charge and refusal, then it is to be reversed. That, and that only, is the matter urged here.

The authorities seem to be uniform, possibly with one

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exception in Illinois. There is a late case in Illinois in which it was held that a suit, brought for interest upon a promissory note after the note itself by its terms became due, was no bar to a suit upon the note itself for the principal. The court say that the promise to pay interest was a distinct and separate promise from the promise to pay the principal. That case is *Dulaney v. Payne*, 101 Ill., 325. *Herman on Estoppel and Res Judicata* says this of that case: "How this principle" (discussing the case and quoting from it) "agrees with the following rule laid down by the same court, is difficult to ascertain." Then he quotes from a case found in 89 Ill., 212, *Rosenmueller et al. v. Lampe*, where it was held, 'that the first recovery was a bar to the second suit, it being considered as growing out of the original contract;' the judgment therein constituted a bar to the second suit.

Aside from that case, as has already been said, the authorities seem to be uniform that where one brings a suit upon a contract—a suit for some part of a claim when several claims have already become due under that contract, he is barred from prosecuting a suit for some other part of the money claimed to be due under that contract.

There are a large number of authorities cited to us in the brief of counsel, in addition to which attention is called to the case of *Jarrett & Deal v. W. R. Self*, 89 N. C. Repts., 478; the first clause of the syllabus reads:

"Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to 'split up' the account and recover upon each item separately."

Second clause of syllabus:

"If there are several payments due under one and the same contract at the time a suit is brought to recover one installment, a judgment for the amount of the latter will be held to be in satisfaction of the whole, as all the sums,

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being due, could have been included in the action. But it is competent for the plaintiff to sue and recover upon each as it falls due, and in the court having jurisdiction of the same."

Third clause of the syllabus:

"Where the plaintiff 'splits up' his account, due under a single contract cognizable in the superior court, and brought actions before a justice of the peace, it was held upon appeal that the superior court did not acquire jurisdiction of the whole amount by consolidating the cases into one action. The appellate jurisdiction is derived solely from the rightful one assumed by the court below."

In 30 Pa. 196, Logan v. Caffrey, the syllabus reads:

"Where labor is performed for another, at various times, under the same entire contract, and there is a recovery in one suit upon such contract, the party cannot maintain a second action, even on clear proof that no evidence was given in the first, as to part of the demand in controversy.

"Nor will a formal withdrawal from the consideration of the jury of one of the items claimed in the first suit, and the entry of such withdrawal on record, enable the party to maintain a second action to recover the item so withdrawn."

This was a cause where a party brought suit before an alderman for \$315.30, made up of two items. For 49 days' work performed by plaintiff for defendant between July 10th, 1854, and September 16th, 1854, at \$1.12½ per day, and for 67¼ days' work, between November 7th, 1854, and February 5th, 1855, at \$1.00 per day. The plaintiff asked and was permitted to withdraw his second claim, at \$1.00 per day for 67¼ days, so that the trial was had only upon the item of 49 days' work at \$1.12½ per day; but the court said that it was clear that there was but one contract entered into, though the price was different, and there were two different times. The 67¼ days was withdrawn by the plaintiff in his first action, and no evidence was introduced about it, and yet it was held that the first action barred recovery of the second because there was but one contract under



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which the plaintiff worked, and it all being due at the time the suit was brought, the plaintiff would not be permitted to split up his action and sue for a part and recover or proceed to final judgment for that part, and then maintain another action for the balance of the labor performed under that contract.

In the case of *Burritt v. Belfry*, 47 Conn., 323, the syllabus reads:

“While a suit for several months’ rent was pending in a city court, the rent being payable monthly under a parol lease for a term of years, another suit was brought before a justice of the peace for an additional month’s rent, but which was due when the former suit was brought and judgment was taken for the same. Both suits were general assumpsit for use and occupation. Held, that the judgment in the second suit was a bar to the first suit.

“The principle that a judgment for a part of an entire demand is a bar to any other suit for another part of the same demand, is everywhere inflexibly maintained.

“Where several payments have become due upon a single agreement, express or implied, the demand is to be regarded as an entire one.

“The omission to plead the first suit in abatement of the second was not a waiver of the right to plead the judgment in bar of the first suit.”

Attention is here called to this case because of the facts that the suit before the justice of the peace was commenced subsequent to the bringing of the suit in which judgment is sought to be reversed in this action; but the suit before the justice of the peace proceeded to judgment, and the fact that the suit, which was then pending in the court of common pleas, was not plead as a bar in that action, does not, as we hold, prevent the pleading of that judgment as a bar in this case. The facts were the same, as far as that is concerned, in this case cited from 47 Conn.

The case in 19 Wend., 207, *Bendernagle v. Cocks*, is to the same effect. And, without stopping to read from it

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and the authorities cited in the several cases to which attention is called and in *Herman on Estoppel*, it fully establishes, as we hold, the proposition that the suit before the justice of the peace was a bar to the prosecution of this suit.

It was urged in argument here, that the court might inquire into the question of whether the facts—the claim made here, was actually tried in the other action, and authorities were cited that in many cases an inquiry may be made as to what was adjudicated in the case which was plead as a bar to the case on trial; but none of those cases hold that where the matter which was tried in the case plead as a bar, was for something due under the one contract and due at the time that the suit was brought, a recovery may be had in a separate action.

We hold that there was error on the part of the court of common pleas in refusing to charge that the suit before the justice of the peace was a bar to this suit.

In 47 Conn., 323, the court in the opinion say, that the principle is so well established, it has been held, as in that case, although very great hardship may result from it—just as may in this case.

Yet we think that this case must be reversed for the reason given. For that reason, and that reason alone, the judgment of the court of common pleas is reversed.

*Everett, Weed & Meals*, for Plaintiff in Error.

*W. S. Kerruish*, for Defendant in Error.

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Boyer et al. v. Davis et al.

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(First Circuit—Clermont Co., O., Circuit Court—April Term, 1898.)

Before Smith, Swing &amp; Cox, JJ.

ALICE J. BOYER et al. v. BELL C. DAVIS et al.

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*Land bought by husband with money of his wife reduced to his possession under former law--No trust estate in wife—*

Where it appears that land bought by a husband was paid for with money which he obtained as the distributive share of his wife in her father's estate, but under the law as it stood at the time, (thirty-five years ago), money of the wife reduced by the husband to his possession became his property, and it does not clearly appear that there was an understanding between husband and wife at the time that the land bought by the husband with the money thus coming to him from his wife, should be held by him in trust for her, there exists no trust for the wife in such land.

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Appeal from the Court of Common Pleas of Clermont county.

SMITH, J.

We are of the opinion that on the pleadings and the evidence submitted, the petition of the plaintiffs, which seeks to engraft a trust upon a deed executed to their father, Ira I. Davis, by Wm. B. Davis, April 4, 1857, must be dismissed. It appears from the pleadings and the evidence that Lydia A. Davis, the wife of Ira I. Davis, and the mother of the three plaintiffs, was the daughter of Isaac Edwards, and on his death as one of his distributees became entitled to the sum of \$416.00, as her share of her father's personal estate. This sum was paid by the administrator of Mr. Edwards' estate, to Ira I. Davis, the husband, and he, Davis, gave a receipt therefor, March 3, 1857. In a proceeding for the partition of the lands of her father, the same were sold, and, as averred in the petition in this case, the \$867.06, the amount found to be due Mrs. Lydia A. Davis from the first payment, was paid to her March 13, 1857, and on December 8, 1857, she received \$986.56, the amount due her on the second payment, and

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on December 8, 1858, the said Ira I. Davis received \$1042.40, the amount due her as the third payment. It does appear from the evidence, that the husband received her share of the personal estate and gave a receipt therefor to the administrator, but there was no evidence offered showing which of the parties received or receipted for any of the money from the real estate.

The petition, however, further avers, and the evidence shows, that on April 4, 1857, Wm. B. Davis conveyed to Ira I. Davis the land in question, for the consideration of \$4,000 by a deed absolute on its face. It further avers that the said Ira A. Davis paid to the said W. B. Davis the \$416.00 received from the administrator as aforesaid, and the \$867.06, the amount received from the first payment on the land, to the said W. B. Davis as part of the purchase money, and gave his notes to Davis for the balance due. And that afterwards Ira I. Davis appropriated the \$986.56 to the payment of his notes, and that he also collected and applied the third payment of the land to said notes. That is, that \$3312.03 of the money which came to Mrs. Davis from her father's estate, went into this land.

The only evidence that such was the case, was as to alleged admissions made by Ira I. Davis thirty-five years ago to two persons, that it had been the case—and we have no doubt that this was so. The difficulty, however, in the way of the plaintiffs, is this: That admitting all that they claim in this regard to be true, and that this money went to pay for the land, that on this state of facts, they do not show any ground to support their claim; for owing to the state of the law then in force, when the money was received by the husband, if it all was received by him, or if part thereof was received by him and part by her, and he obtained possession of that received by him, and used it, or appropriated it to his own use, as he did by paying it out for land purchased by him in his own name, the money became his,

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at once, and the property purchased with it was his, unless, at the time he received it, or subsequently, there was a valid contract between husband and wife that the money was to remain the property of the wife or that it was to be invested for her benefit, or unless something is shown to prove that the money did not become the property of the husband when he received it and converted it to his own use. In this case, there is no sufficient evidence to show anything of this kind. There is no pretense that any arrangement was ever made between husband and wife that he was to buy the land for her, or that the title was to be taken by him in trust for her. There is evidence tending to show that she wanted him to have the land conveyed to her, but that he refused, and there is nothing to rebut the presumption which the law raises, that when he received her money from her father's estate, as her husband, it immediately vested in him—and his conduct shows that he did reduce it to his possession. It is true, that in the conversations of the husband, thirty-five years ago, before mentioned, Ira I. Davis is said to have stated that it was his wife's money which went into the farm. But even if this was his exact language, which may well be doubted, we think his meaning simply was, that the money which he so received and used, was the money which came to her from her father's estate—not that it was her money after he received it. It would not do to engraft a trust on a deed absolute on its face, (which can only be done, by clear and convincing evidence) on such a statement as that, particularly in view of the fact, that the claim of Davis always was, up to the time of his death, that he was the owner of the land. The petition must be dismissed

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Lloyd Lumber Co. v. Solon.

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(Sixth Circuit—Lucas Co., O., Circuit Court—October Term, 1898.)

Before King, Haynes and Parker, JJ.

THE LLOYD LUMBER COMPANY v. JOHN T. SOLON, Surviving Partner, etc.

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*Breach of contract for sale of cordwood—Measure of damages—*  
In a suit for damages for breach of a contract by which defendants, manufacturers of cordwood, agreed to furnish all the cordwood manufactured by them to the plaintiff to be by him sold, plaintiff to pay therefor certain prices, for the term of one year, renewable for five years more at plaintiff's option, to ascertain the damages to which plaintiff would be entitled by the breach of such contract by defendant, the price of other property of the same kind in the market which plaintiff might have bought should be ascertained, and the difference of the market price and the contract price would be the measure of damages. This is the rule unless the property is of a peculiar kind and can not be obtained in the open market, or there is no market price for such property, when profits naturally to be expected may be considered.

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Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

A petition in error is filed in this court for the purpose of reversing the judgment of the court of common pleas in an action tried in that court wherein Solon was plaintiff and the Lumber Company was defendant. Judgment was rendered for the plaintiff below. The questions arise mainly on the charge of the court.

The action was brought for an alleged breach of a contract that had been entered into between Solon and his partner and The Lumber Company, the leading points of which were substantially these: the agreement was made on the 27th day of September, 1895, between the Lloyd Lumber Company of the first part and Solon & Schoen of the second part. "The party of the first part is engaged in a general lumber manufacturing business, including the manufacture of cordwood. That said party of the first part doth hereby agree to sell and transfer to the said parties of the

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Lloyd Lumber Co. v. Solon.

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second part the sole right to sell and dispose of all of the cordwood now in possession of the said party of the first part, or to be hereafter manufactured by it." Then it makes provisions for the erection of sheds, and provisions in regard to the occupation of the sheds by the party of the second part, and the use of the office and telephone. They further agree not to dispose of any of its wood to other parties, reserving, however, the right of use for itself and its employes. And the parties of the second part agreed to pay the party of the first part, its successors and assigns, 60 cents a cord for the first 1500 cords which they shall sell or dispose of, 75 cents a cord for the second 1500, \$1 a cord for that which they may thereafter sell or dispose of. It is further agreed that payment should be made on the Monday of each week following the sale of the wood. It was further agreed that in case of a shipment or sale by the car load, the payment might be made thirty days after the shipment. And it was further agreed that the party of the second part should use the horse and team of the party of the first part, and pay 30 cents an hour. It then provides:

"It is further mutually agreed and contracted between the parties hereto that this agreement is made for and shall continue in force for a period of one year from the date of this contract, and that the agreement may be continued and renewed at the option of the party of the second part for a period of five years from the expiration of this contract, provided said party of the second part shall pay said party of the first part, its successors and assigns, for the wood which they may sell and dispose of at the rate of \$1 per cord."

The petition was filed setting up this contract, to a certain extent. It says:

"That plaintiffs entered into said agreement in good faith, and went to great expense to complete an outfit to sell and deliver said wood, and by the labor, skill, and advertising were put to great expense in getting said business begun, and by reason of said labor, skill, advertising and money

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expended, had succeeded in getting said business started so that there was a large profit from the sale of said wood, and were faithfully carrying out on their part all the conditions of said contract with great profit to themselves for their labor and skill. That on or about the 30th day of July, 1896, and while said contract was still in full force, the defendant, without warrant or authority, and without the consent of plaintiffs, by force and arms refused to allow plaintiffs to take and sell any more wood, and have so continued and do now refuse to allow plaintiffs to enter upon the premises, or take, remove and sell any of said wood, to their damage in the sum of \$5000."

For which they ask judgment.

This action was commenced on the 31st day of August, 1896. The contract was made in September, 1895, and they soon after entered upon the preparation to do the work, and soon after commenced in fact to sell the wood, and continued to do so until this date, July 31, when, as alleged, the contract was broken.

The answer first denies the contract for some technical reasons, and then avers that the plaintiffs failed and neglected to make payments in said contract—failed in June, July, and August, '96, to make payments—which thereby terminated the contract; also sets up that they should use defendant's team, which they failed to do, and in that respect they failed to perform the terms of the contract.

The case came on for trial, and testimony was taken on behalf of both parties, tending to sustain the allegations of their respective pleadings, and tending to show the prices at which wood was selling at that time, and had been selling for the year previous, and also the cost and expense of selling the same. And thereupon the court came to charge the jury, and charged it substantially as follows:

"First. As to the first branch of the plaintiffs' claim—as to the expense incurred of fitting up preparatory to the doing of the business provided for in this contract: this would be the reasonable value of the work and expense in-



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curred in such proportion as the time occupied in the carrying out of this contract bore to the whole contract. The plaintiffs would not be entitled, of course, to all the expenses incurred in the building of these sheds and doing this advertising, for the reason that the plaintiffs have had a proportion of the advantage to be derived from these, in that they have sold this wood for the company from perhaps the 4th of October—you will get that date from the evidence—down to the 30th of July, 1896. But this contract was to continue for a length of time after that, which is shown by the contract already read to you. Now then, for the reasonable proportion of this expense that the value of the use they had of it bears to the value of the use of it that they did not have—if entitled to compensation in damages—they would be entitled to have.

“Second. As to the loss of profits, here are the rules of law by which this question of recovery of profits is to be determined. It is frequently said that recovery cannot be had for profits; but that is not a correct statement, gentlemen, of the law. The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: first, the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation. And they must be certain, both in their nature and in respect to the cause from which they proceed. Or, as it is otherwise stated—substantially the same—first, the damages must flow naturally and directly from the breach of the contract; that it must be such as might be presumed to follow its violation, and must be, not the remote but the proximate consequence of the breach. In this case, gentlemen, this contract was not one providing for the purchase and sale of wood in the open market, but it was a contract providing for the carrying on of the business of selling wood produced and owned by the defendant company—produced in its business, to be sold by the plaintiffs to other parties under the conditions and stipulations of this contract, for the mutual advantage and profit of both parties—both the plaintiffs and the defendant company; and by this contract it was provided that the de-

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defendant company should receive from the plaintiffs the prices specified in the contract, and that the plaintiffs should be entitled to have and receive for their profit and advantage whatever excess they might realize from the sales of the wood over and above the prices paid and the expense of carrying on the business of selling and delivering this wood to these other parties; and therefore, in determining the damages, if you reach the question of the plaintiffs' damages, the question before you to determine will be, what was and has been the fair cash market value of such wood as this, delivered in the manner in which it was to be delivered, at the time of this contract and up to the present time? And from that you may infer and judge and determine as to what it will be during the balance of the time named in the contract. Second, what was the reasonable and fair cost and expense of such delivery and all other expenses connected with the sale of said property, in order to realize the price which they would get from their purchasers? What was the difference between the price the defendant was to receive and the net receipts of the plaintiffs—that is, the amount received by plaintiffs after deducting their expenses would be the rule of damages to be awarded to the plaintiffs, because it would be in accordance with the understanding to be inferred from this contract by these parties at the time the contract was entered into and during its performance.

“Now, as to these damages, there can be but one recovery by these plaintiffs, if they are entitled to recover at all, for the breach of this contract, and in order that they may be fully compensated for this breach of the contract, if there has been a breach of the contract; and if they have a right to recover at all, this recovery would be for the full term which they at their option had the right to have this contract continue, because, if they should recover only for damages up to a certain time, they would be precluded from commencing any other suit against the parties for a breach of this contract.”

It will be observed that the case is one in which the controversy arises in particular in regard to the rule of damages that the plaintiffs below are entitled to have, if they

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were entitled to recover. The question of damages under contracts is usually one of more or less difficulty. The one under this contract is one of considerable difficulty. The contract itself was rather peculiar. It was a contract whereby the Lumber Company was to sell these parties substantially all the wood that they manufactured, who were to account to the Lumber Company for it at a certain price. But the Lumber Company on its part did not covenant to run the mill an hour, or any length of time, nor to deliver any certain quantity of wood. Nor did the plaintiffs themselves agree to take all the wood. They had the privilege of taking it and of selling it. The contract was defined, in so far as time was concerned, for one year, and then at the option of the parties of the second part, it could be extended five years longer without giving notice to the Lumber Company. They say five years after the contract, but whether that meant five years, or four, is perhaps immaterial. This contract was alleged to have been broken before the first year expired. The action was brought before the first year expired. There is no evidence that the plaintiffs below ever gave notice to the Lumber Company that they would extend this contract for the period provided in the option; and whether they would have a right to recover for damages after the first year in case of a breach of the contract, without formally and definitely giving that notice, we think is very questionable.

The point, however, has not been argued before us, and we do not decide it.

. It is said in the charge that this is not a sale of wood, but it is a sale of the right of taking the wood. It seems to us it is practically a sale of the wood as manufactured by the Lumber Company. At least, so far as the rule of damages is concerned, it is the same as it would be in the case of the sale of personal property. It appears from the contract and from the evidence that there is a market price for

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wood purchased in this market for the purpose of re-selling the same in the market; and the testimony tends to show that these parties might, if they chose, have gone into the market and purchased cord-wood. We think the general rule of damages laid down by all the authorities is, that upon the sale of property, where there is other property of the same kind in the market which can be purchased, it is the duty of the party who claims that his contract has been broken to go into the market and purchase the property. If he has to pay more than he agreed to pay the other party, then he can recover the difference between the amount he has to pay and the contract price. And that would be the rule of damages. We think that is the rule that should be applied in this case—at least, we think the rule in regard to profits should not be applied, because under all the authorities, as we understand them, the rule in regard to profits is not allowed except in very peculiar cases, as where there is no other similar property in the market, or there is no market price for the property—that is, where the property has been sold in some form for a definite and particular price, and inasmuch as there is no market for the re-sale or re-purchase of it, then the rule in regard to profits applies.

It would seem from 16 Ohio St. that quite an argument might be made here in favor of the proposition that the rule of damages here might be the value of the good will. This would depend upon all the contingencies of the case. But whether it is the contract rule or the true rule, we do not deem it necessary for us to decide at the present time. It is sufficient that we hold that the rule as laid down by the court for the recovery of damages by fixing the profits, ascertaining the profits, for the whole term, and that without any regard as to whether these parties had gone on and worked afterwards, is not the true rule; and for that reason the judgment of the court of common pleas will be reversed, and the cause will be remanded for a new trial.

*R. H. Holbrook*, for Plaintiffs in Error.

*M. B. Lemmon*, for Defendant in Error.

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**Wells v. The C. C. C. & St. L. Ry. Co.**

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(Third Circuit—Seneca Co., O., Circuit Court—Dec. Term, 1898.)

Before Day, Price and Norris, JJ.

**WINFIELD S. WELLS v. THE C. C. C. & St. L. RY. CO.**  
**BENJAMIN F. SCHEIDLER v. THE SAME.**

[Two Cases.]

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*Railroad Fare—Computation of fractions of mile—*

- (1). The provision contained in the last clause of sec. 8374, R. S., as follows: "But the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," is not ambiguous or obscure, and interpretation or construction thereof, is not necessary or permissible.

*Same—*

- (2). The clear and plain sense and meaning of the provision is: That multiple of five in closest proximity—nearest to—the result obtained by multiplying the rate by the distance, whether such multiple be nearest above or below such result.

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Error to the Court of Common Pleas of Seneca county.

The two cases have similar facts, and were submitted, considered, and disposed of together. The plaintiffs in error were plaintiffs below. The C. C. C. & St. L. Ry. Co. was defendant there and here. The action by both plaintiffs, was to recover a penalty for overcharging, in the matter of fare charged the plaintiffs as passengers on defendant's railway, under the provisions of sections 3374 and 3376, Revised Statutes. There are five causes of action set out in Wells' petition, and two in Scheidler's. Wells, for a first, second and third cause of action, states, that, in the due course of his business, he, at three different dates, to-wit: June 15th, July 12th and August 5th, 1897, found it necessary to travel over defendant's railroad between the city of Tiffin and the Village of Carey, Ohio, two stations on the said railroad. That on each occasion he purchased a ticket of defendant's agent. That such agent, at each time, charged and received, and plaintiff paid for each ticket, as fare, the sum of fifty cents; that the distance from Tiffin to Carey and *vice versa* is, by actual measurement, 15.6 miles, and

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Wells v. The O. C. C. & St. L. Ry. Co.

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no more. That the amount so charged and received and paid was more than defendant was, by law, entitled to charge for riding on said railway said distance. Similar allegations are made for a fourth and fifth cause of action. That plaintiff purchased a ticket from Tiffin to Berwick and from Berwick to Tiffin, stations on defendant's road, on the 4th of April, 1898; that defendant's agent charged and was paid for each ticket thirty cents, while the distance between said stations is only 8.62 miles. The statement is made that said charges of fifty and thirty cents were in excess of the rate allowed by law; whereby a right of action has accrued to plaintiff on each cause of action stated in the petition, and he prays judgment for \$750.

In similar language, Scheidler's two causes of action are stated, to the effect that defendant company charged him as fare from Tiffin to Berwick, and from Berwick to Tiffin, the full sum of thirty cents for each fare, the distance being only 8.62 miles, the same being an overcharge, whereby a right of action has accrued to him, and he prays judgment for \$300.

The defendant company interposed a general demurrer to each cause of action set out in each petition; that the facts stated do not constitute a cause, or causes of action against the defendant. The court of common pleas sustained the demurrer as against all the causes of action in both petitions, and plaintiffs not desiring to amend or further plead, the petitions were dismissed and judgment given against plaintiffs for costs. Plaintiffs seek a reversal of the judgment by proceedings in error in this court.

DAY, J.

The facts are plainly stated, and for purposes of the demurrer must be regarded as true. It is true, therefore, that the distance from Tiffin to Carey is 15.6 miles, and as fare for carrying plaintiff that distance, the defendant railway company charged and received, and plaintiff paid the sum of

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Wells v. The C. C. C. & St. L. Ry. Co.

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fifty cents; that between the stations of Tiffin and Berwick the distance is 8.62 miles, and the defendant company charged and received, as fare, the full sum of thirty cents from plaintiffs.

The law, section 3374, Revised Statutes, limits the rate of fare a railroad company may demand and receive for carrying a passenger for a distance of more than eight miles, to not exceeding three cents per mile. The distance between the stations named, is more than eight miles, and the provision of the section plainly applies and limits the rate that may be demanded and received for transporting a passenger between them, to three cents per mile; so that it would seem to be a plain and very easy matter to ascertain the lawful sum to be charged for the service rendered. As for instance: the one distance from Tiffin to Carey, 15.6 miles, multiplied by three cents, the lawful rate per mile, would make 46.8 cents that could with propriety be demanded and received as fare; while for the other distance, from Tiffin to Berwick, 8.62 miles, 25.86 cents might be demanded and received, and no more; and any sum charged and received in excess of these amounts, it follows, would be overcharges, and would subject the company exacting them to the penalty provided in section 3376, Revised Statutes, of \$150 for each violation of its provisions. And such must, of necessity, be the ultimate conclusion of the matter, that the facts stated in the petitions, under the very plain provisions of the statute limiting the maximum amount of fare that can properly be demanded and received, to three cents per mile, constitute good causes of action entitling the plaintiffs to recover, unless there is something in the provisions of the last clause of section 3374, Revised Statutes, that materially modifies and changes the first part permitting the railroad company to demand and receive a greater rate than three cents per mile, in certain circumstances and conditions. Section 3374, Revised Statutes, entire, is as follows:

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Section 3374. "A company operating a railroad, in whole or in part, in this state, may demand and receive for the transportation of passengers on its road not exceeding three cents per mile, for a distance of more than eight miles; but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance."

The last clause of the section certainly modifies, to an extent, the rigid provision of the first, and in some situations permits a greater rate, and in other and different situations, we think, requires a charge of slightly less than the maximum rate of three cents per mile. In the enactment of the section, the law-makers evidently had in mind some such situation as is described in the petitions, where, by reason of fractional parts of a mile, the proper and lawful fare to be demanded and received, would include the fractional part of a cent, making it difficult, if not impossible, to readily make change or to collect fare to the full extent allowed by the first provision of the section; and so, to relieve the situation, there was incorporated into the law the last clause of the section; thus establishing a rule, which, if reasonably understood and properly observed, will enable the carrier to practically collect fare to the full extent of the maximum limit fixed, and also be just and equitable to both the railroad company and its patrons. The provision is simple, easily understood; is fair, and will, we think, in the operation of a railroad extending a considerable distance, have the effect to equalize the fare paid and received, and make it approximately average the legal rate provided, of three cents per mile. It will never, in any event, permit an overcharge of more than two and one-half cents, or require a relinquishment of more than that sum, with the probabilities that the over and under charge will average very nearly the legal rate. Such a provision is altogether reasonable, just and convenient, and should be accepted and acted upon in good faith, by all the corporations for



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whose convenience, chiefly, it was made part of the section. But not so; for it appears the defendant company is not content with the plain provisions as formulated and popularly understood, but is seeking, through the medium of judicial interpretation, to have a view taken of the matter more favorable to its interests. It is, accordingly, through its counsel, urging the courts to construe and interpret that portion of the last clause of the section 3374: "That multiple of five, nearest reached by multiplying the rate by the distance", to mean, that multiple of five nearest above or in advance, reached by the process of multiplying the rate by the distance; and to do this, it would be necessary for the court, by construction or judicial legislation, to interpolate into the section, substantially, the words; in advance, or above—and to eliminate therefrom every reasonable suggestion of a multiple of five that could be nearest reached in any other direction. Such a construction would be a very strained one, and wholly without warrant. Unless the sense and meaning of the text is involved and obscure, there is no occasion for interpretation at all. The sense and meaning of the provision seems apparent. It is not in the least ambiguous or obscure; but all is plain and open and patent, so there is absolutely no call or excuse for interpretation. The phrase or wording: "That multiple of five nearest reached," means just that, and nothing more.

"Nearest," is immediately adjacent to—in closest proximity. "Reached" is stretched out or forth—extended. Neither word indicates direction. So when used in connection as in the clause of the section under consideration, they indicate the object in closest proximity—closest to—and reached by the least extension or stretching forth,—without reference to direction—in any direction. Therefore the wording: "that multiple of five nearest reached by multiplying the rate by the distance," clearly and plainly means the multiple of five in closest proximity to the result.

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**McHenry v. The Batavia Building & Loan Co.**

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obtained by multiplying the rate by the distance, whether it be above or below, and whether it is reached by an extension, either upward or downward, from such result. If this holding is correct, then, applying it to the facts appearing in the petition, it gives the following results: The distance from Tiffin to Carey is 15.6 miles; this multiplied by the rate, three cents per mile, gives 46.8 cents. The multiple of five closest to this amount is 45; or, 45 cents the defendant company was authorized to demand and receive. Having charged fifty cents, there was an overcharge.

By a similar process, 8.62 miles, the distance between Tiffin and Berwick, multiplied by the rate per mile 3 cents, gives 25.86 cents. The multiple of five in closest proximity to this sum is 25, and in charging and receiving 30 cents, the defendant company was guilty of an overcharge; for all of which it is liable to the discipline provided by section 3376, Revised Statutes. It follows the facts stated in the petitions constitute causes of action, and the lower court was in error in sustaining demurrers on that ground.

The judgment is reversed, with cost. The demurrers are overruled, and defendants held to answer.

*Willis Bacon*, for Plaintiff.

*McCauley & Weller*, for Defendant.

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(First Circuit—Clermont Co., O., Circuit Court—April Term, 1898.)

Before Cox, Smith and Swing, JJ.

**CARRIE McHENRY v. THE BATAVIA BUILDING & LOAN COMPANY.**

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*Foreclosure of mortgage—Personal judgment over—When admissible.*

In an action to foreclose a mortgage, there can be no personal judgment against the mortgagor for the amount of the debt secured by the mortgage, or any part thereof, unless the mortgagor is personally liable for such debt or for some part of it. If a person executes a mortgage to secure a debt for

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which he has not made himself liable, the mortgagee, so far as the mortgagor is concerned, can look only to the property so mortgaged.

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Error to the Court of Common Pleas of Clermont county.  
SMITH, J.

The claim of the plaintiff in error is, that the court of common pleas erred in entering judgment against her for \$475.42, the balance found to be due to plaintiff on a mortgage executed to it by said Carrie McHenry, after the sale of the mortgaged premises by order of the court, and the crediting on the amount due on said mortgage, the part of the purchase money applicable thereto, and in awarding execution against her for said balance.

The petition in the case averred among other things, that Carrie McHenry, one of the defendants, was a member of said company and the owner of four shares of its capital stock, and that on May 13, 1895, the company advanced to her \$1,480, the estimated value of said  $3\frac{1}{10}$  shares of its capital stock as a loan. And that in order to secure the payment of said sum, said defendant, with her husband, executed to the plaintiff a mortgage on certain real estate, (describing it) which was duly recorded. That said mortgage was conditioned to be void, if the said Carrie McHenry should pay as therein provided until the payments therein provided to be made by her, should amount to \$400 on each share so borrowed. That she failed to comply with these stipulations, and that there was a balance due the company of \$1408.76. "Wherefore plaintiff prays that the equity of redemption of the said defendant in said premises may be foreclosed; that an account be taken, and that it may have judgment for the amount found due on its said cause of action; that said premises may be sold free of all claims of the defendants herein; and that the proceeds of said sale may be applied to the payment of the amount due plaintiff, and for such other and further relief as is proper."

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No answer was filed to this petition, and at the trial, January 31, 1898, an entry was made, showing that the same came on for hearing on the petition and the evidence, and the court found that the defendants were in default, and that the allegations of the petitioner are confessed to be true, and that therefore defendants have failed to pay plaintiff, as set forth in the petition, and that there was then due plaintiff thereon \$1,426.70, and it was ordered that unless defendants should pay said amount, and the costs, the property should be sold.

On the 25th of April, 1898, a final decree was entered in the case, confirming the sale of the real estate, and ordering the distribution of the purchase money, \$1,168.65, as follows: First: To the treasurer of the county, the taxes and penalty on the property, \$30.49. Second: The costs in the case, \$71.23. Third: The court found the amount due on the mortgage up to that date to be \$1,492.35, and ordered the sheriff to pay the balance in his hands, \$1,016.93 to the plaintiff as a credit on its claim, and that there still was due to the plaintiff \$475.42, which it was adjudged by the court that it recover from the defendant, Carrie McHenry, and that execution be awarded therefor.

We have no question, but that in an action brought to foreclose a mortgage, there can be no personal judgment rendered against the mortgagor for the amount of the debt secured by the mortgage, or any part thereof, unless the mortgagor is personally liable for such debt or for some part of it. If a person executes a mortgage to secure a debt for which he has not made himself liable, the mortgagee, so far as the mortgagor is concerned, can look only to the property so mortgaged.

But we are of the opinion, that on the allegations of the petition in this case, and the judgments or decrees of the court, this rule has no application to this case. The petition expressly avers that the plaintiff in error, Carrie Mc-

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Henry, was a member of the company, and the owner of four shares of its capital stock, and that on May 16, 1895, the company advanced to her \$1,480, the estimated value of her stock, as a loan, to be re-paid in a certain way and manner stated therein, which she had failed to do, and that there was a balance due from her of \$1,405.76, for which a judgment was asked and a foreclosure of the mortgage.

Default having been made, the case was heard on the petition and evidence. What evidence was submitted, was not shown, but the court found the amount due on the plaintiff's claim to be \$1,426.70. The presumption would be, that the evidence fully supported the claim of plaintiff that the amount received by the defendant was received as a loan to be repaid as stated on the petition.

The debt not being paid by the sale of the land, we think, the court was authorized to make the order it did, finding the balance due from the plaintiff in error, and awarding execution therefor. The judgment will be affirmed, with costs, but without penalty.

*H. J. Nichols*, for Plaintiff in Error.

*L. J. Walker*, for Defendant in Error.

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(First Circuit—Clermont Co., O., Circuit Court—April Term, 1898.)

Before Cox, Smith and Swing, JJ.

FLORENCE McDONALD et al. v. LAURA G. BOARDMAN and  
J. H. KNAPP et al.

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*Joint Liability of non-resident with resident—Joint action—Jurisdiction—Evidence—*

Jurisdiction over a non-resident party can not be obtained by simply averring a joint liability with a resident of the county in which the suit is brought where the evidence fails to show such joint liability; and this notwithstanding the fact that such non-resident has only interposed a general denial, without pleading the improper joinder and service.

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McDonald et al. v. Boardman et al.

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Appeal from the Court of Common Pleas of Clermont county.

SMITH, J.

In this case we are of the opinion, that there should be a decree in favor of the defendants dismissing the petition of the plaintiffs. It is true that the said plaintiffs, at the request of some one, (it may be of Mr. Gardner, who is not a party to this case, but who denies that he had anything to do with it), together with Thaddeus Bunker, their great-uncle, executed and delivered to one Fuller a deed for the lot in question, which had been devised by Mrs. Bunker, the wife of Thaddeus, to him for his life, and upon his death to the plaintiffs in fee, in consideration of \$1,350 as stated in the deed, but of which they never received any part, nor is there any claim that it was ever arranged between the parties that they were to receive any part thereof. What became of the whole of the \$1,350 does not appear, but it was shown that \$1,000 of it was paid to Mr. Bunker by the grantee, by a certificate of deposit given to him, or to Gardner for him, and that this \$1,000 was turned over by Gardner and Bunker to the defendant Knapp; who was the executor of the will of Mrs. Bunker. By the terms of the will, Knapp had no control of the lot in question, had no interest therein, and was charged with no duty concerning it. There was in his hands, as executor, about \$2,000 in money or notes, after the payment of the debts of the testatrix and of certain legacies given to others, to the use and income of which Bunker was entitled as long as he lived, and the executrix also had the power, and it was his duty under the will, to use so much of the principal of said fund as might be needed for the support and maintenance of the old man. At the death of the husband, whatever of the personal estate remained after the payment of the debts of the testatrix and of the special legacies, was to be divided equally among the plaintiffs, who were grand-nieces of Mr. & Mrs. Bunker.

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The claim made on behalf of the plaintiffs as to the manner in which this deed was obtained from them, was this: Mrs. McDonald testifies substantially, that after the death of Mrs. Bunker, the testatrix, that she was living at Norwalk, some distance from Oberlin, where Mr. Bunker and J. W. Gardner, a distant relative of his, and her cousin resided, and that she received a letter from Gardner, enclosing the deed in question, which had been signed and acknowledged by Mr. Bunker as one of the grantors on the 18th day of March, 1892, in which letter he asked her to execute the deed and send it to the other plaintiff, Mrs. or Miss Gaston, for execution by her. That she did execute and acknowledge it on March 21, 1892, without reading it and without knowing anything of its contents, and then sent it to Miss Gaston to be executed by her. That she made no inquiry in regard to the matter, and had no knowledge of the character of the paper, which she had executed, until after the death of Bunker, perhaps in 1894. She also says that she had not at the time, or for years after, any knowledge of the provisions of the will, or that she had any knowledge that she had any interest in the lot until after the death of the husband.

The other plaintiff testified that she had received the deed in a letter from Miss McDonald in this form:

“Dear Cousin Laura:

“Sign your name on this paper and return to J. W. Gardner, Oberlin, Ohio.

“Your Cousin,

“Florence A. McDonald.”

That thereupon, she executed the deed before a notary public (March 22, 1892), and sent it to Gardner as directed. She also testified that she did not read it, and had no knowledge of its contents or that she had any interest in the estate until December 24, 1894, after the death of Bunker.

These statements as to the ignorance of the plaintiffs,

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as of the character of the instrument and of its contents, and as to their having no knowledge of their interest in Mrs. Bunker's estate, are hard to credit. These young women were of full age, and evidently possessed at least of ordinary intelligence, and from other circumstances disclosed in evidence, must have had more knowledge as to these matters than they say they had. But whether this is so or not, it cannot in any way affect the validity of a deed which they executed and acknowledged in due form of law, and entrusted it to another person for delivery.

Nor is there anything disclosed to show any fraud in this transaction on the part of Knapp in the procuring of this deed, or any knowledge on his part that any fraud had been perpetrated upon them by anyone. It is clear that he had no knowledge whatever of the deed until after it had been executed and delivered to the purchaser, and the payment of at least \$1,000 by him. Indeed it is difficult to see a fraud on the part of anyone. The plaintiffs were simply asked by some one to execute the deed, and did so in the exceedingly negligent and careless manner testified to. There is no pretense that any statement, false or otherwise, was made to induce them to do so. One of them says her cousin, Gardner, asked her to sign it, and she did so. He denies this explicitly. Evidently, however, he was acting for Bunker, after the deed was executed and returned to him at least, and, with Bunker, received for him, from the purchaser, \$1,000, which was deposited in the bank for Bunker; what became of the \$350 does not appear. But some days after this, Knapp, who lived at a distance from Oberlin, came on business of the estate, and, at the instance of Bunker and Gardner, took this \$1,000 to invest for the benefit of Bunker, and loaned it on note and mortgage in the name of Bunker, the note running for three years. It is probable that Knapp may have supposed that the money was the purchase price of this lot, though he



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says that he was never informed that such was the case. Bunker, some time before that, had wanted him to sell the land as executor, but he had consulted the probate judge of the county in regard to the matter, and had been informed by him that, as there was more than enough personal property to pay the debts, that he, as executor, had nothing to do with the lot, but that Bunker and the plaintiffs could join in its sale, and he so informed Bunker. And this was all he had to do with it.

A year or two after this \$1,000 was invested by Knapp for Bunker, the latter removed to Clermont county. He met with an accident, and by reason thereof became almost helpless, and the income from his interest in his wife's estate was not sufficient for his comfortable support. He was living with a relative of his wife, Mrs. Boardman, and made with her a contract, that if he would pay her \$925, she would support him during the remainder of his life. The money was to be invested by her in the purchase of a home. Knapp was advised of this, and Bunker requested him to collect the \$1,000, but as it was not due, it could not be done. Some time after this, Knapp, at the request of Bunker, purchased the note for \$950, sent him the money and the note and mortgage were transferred to him, and Bunker paid the money to Mrs. Boardman, who invested it in the purchase of a home. The claim of the petition is that this was a fraudulent contract between Bunker and Mrs. Boardman and Knapp, to defraud plaintiffs. There is not a scintilla of evidence as to this. For all that appears the arrangement was a fair and reasonable one, without any knowledge on the part of Mrs. Boardman or Knapp that the plaintiffs had any claim to the money, and the additional claim of plaintiffs, that they can hold the lot of Mrs. Boardman into which the money was put, has no foundation. Indeed, it is difficult to see on the whole case how the plaintiffs have been substantially injured, even if

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they conveyed away their interest in the lot devised to them in the negligent and careless manner which they claim. The executor, Knapp, was authorized and required by the will to use any part of the principal of the \$2,000 of personal property in his hands for the support and maintenance of Bunker, and the plaintiffs were only to have what remained after that. The payment to Mrs. Boardman was a reasonable one, and the result was that the \$925 came out of their interest in the lot, instead of their interest in the personalty, all of which has been paid to them by Knapp, as executor.

The allegations of the petition as to fraud and conspiracy between Mrs. Boardman, and Knapp being wholly unsupported by the evidence, when this appears it is clear under the law, that the plaintiffs had no right to sue Knapp in this case and obtain jurisdiction of his person by serving him with process in another county than that in which he resides. If jurisdiction of a defendant could thus be obtained, by simply averring a joint liability with a resident of the county in which the suit is brought, it would result in great injury to the rights of the non-resident parties, and cannot be permitted. This clearly appears by the decision of the case of *Dunn v. Hazlett*, 4 Ohio St., 435. If therefore, there was any fraud on the part of Knapp in the original transaction, that claim, under the circumstances, cannot properly be adjudicated in this action in Clermont county.

It is claimed that Knapp cannot now avail himself of this defense because he did not plead the improper joinder and service, having interposed only a general denial. We think the other course is the proper one, but the facts being conceded, we will allow such an answer now to be interposed, and on that being done, the petition of the plaintiffs will be dismissed.

SWING, J.

I agree with Judge Smith as to the judgment that should

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be entered in this case, on the ground that the evidence does not show any joint cause of action against Knapp and Mrs. Boardman, and that no separate judgment can be rendered in this county against Knapp. But I am convinced, from the evidence, that Knapp had full and complete knowledge that the money received from the sale of this property was the property of these plaintiffs, and not the property of old man Bunker, except that he had a life estate in it. But the action should be against Knapp alone.

*Mr. Sewell and J. B. Swing, for Plaintiffs.*

*Lutes & Lutes, for Knapp.*

*Col. West, for Mrs. Boardman.*

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(First Circuit Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

M.D. NEWBERGER AND THERESA LOEB, Executors of Leopold Loeb, Deceased, v. FRANK B. FINNEY, Administrator de bonis non with the will annexed to the estate of E. Ronsheim, Deceased.

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*Suit against administrator and his sureties—On judgment against sureties only, principal need not be joined—*

(1). Where a principal and his sureties are sued together, and the principal being in default but the sureties answer, judgment is rendered against the sureties, but not against the principal (as should have been done), and the sureties take the case on error to the circuit court without joining the principal as a party to such error proceedings, such principal is not a necessary party thereto, and a motion to dismiss such proceedings for failure to make such principal a party thereto, it being too late to make him a party, will be overruled.

*Erroneous sustaining of demurrer not ground for reversal if not prejudicial—*

(2). The erroneous overruling of a demurrer by the trial court will not be ground for reversal of the judgment where it appears from the record of the case that the adverse party was not prejudiced thereby.

*Appointment of administrator de bonis non only instead of "with the will annexed"—Liability of sureties for assets coming into his hands—*

(3). Where on the death of an executor, an administrator de bonis non only is appointed instead of an administrator de bonis non with the will annexed, by mistake of the probate court,

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and his bond is executed as such administrator de bonis non only, his sureties on his bond as administrator de bonis non will be liable for assets coming into the hands of such administrator acting as administrator de bonis non with the will annexed.

*Proof of original bond—What necessary—*

- (4). Where in an action on an administrator's bond the sureties thereon deny the execution of the bond by them, if a certified copy of the record of the bond is produced and offered in evidence, under sec. 5, R. S., it would be prima facie evidence of the execution of the bond; but where the original is offered and an effort made to prove the signatures of the defendants thereto, evidence must be produced which will satisfy the jury by its weight that the defendants did actually sign the bond, and if such evidence is not produced, the verdict must be in their favor; and a charge by the court that the bond produced being conceded to be the original bond filed with the probate court, and testimony having been introduced tending to show that it has been in the possession and custody of the probate court from the time of its execution to the present time, that the introduction of such bond made a prima facie case of its execution and existence, is error.

Error to the Court of Common Pleas of Hamilton county.  
SMITH, J.

The petition in error, in this case, seeks the reversal of a judgment rendered in favor of the defendant in error against the plaintiff in error in the court of common pleas, in a case brought by said Finney, administrator against them, and one William Ronsheim, to recover the sum of \$5,200, and interest thereon claimed to be due from Ronsheim, as money received by him as administrator de bonis non of the estate of one Ephraim Ronsheim, deceased, and the suit was upon a bond, given by him as such administrator, on which bond the petition alleged that Newberger, and Leopold Loeb deceased, were the sureties. The petition alleged that Wm. Ronsheim, as such administrator, received assets to the amount of \$5,200, but made no settlement of said estate, nor filed any account in the probate court, and neglected to administer said estate according to law, but appropriated said

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\$5,200 to his own use, and has not accounted for or paid said money to those entitled thereto, but has absconded and left the state. That after this, he was removed from said trust by the probate court, and the plaintiff was appointed administrator de bonis non of said estate in his stead. There were other averments in the petition to show the right of the plaintiff to recover from said Ronsheim and his sureties on the bond given by Ronsheim as said administrator, a copy of the condition of which bond was set out in the petition.

All of the defendants were served with process, but Ronsheim made no appearance or defense. Answers were filed by the other two defendants. A demurrer to one of the defenses was sustained by the court, and amended answers filed. The issues made by these pleadings were submitted to a jury, and a verdict rendered in favor of the plaintiff against the answering defendants, and a motion for a new trial having been overruled, judgment was entered upon the verdict against the two defendants who answered. No judgment appears to have been entered against Ronsheim. A bill of exceptions was allowed purporting to contain all of the evidence offered, the charge of the court, and the special charges given and refused, and the exceptions thereto, and a myriad of exceptions to the rulings of the trial court as to the admission and exclusion of evidence.

Thereupon the two defendants against whom the judgment was rendered filed this petition in error, assigning as error that the court erred in overruling the motion for a new trial based on the ground, that the verdict was against the evidence; and in sustaining a demurrer to one of the defenses of the defendants, and erred in its rulings as to the admission of evidence, and in the charges to the jury given and refused.

To this petition in error Wm. Ronsheim was not made a party, and on this ground the defendant in error moves to strike the petition in error from the files, it being now too late to make him a party.

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We think that this motion should be overruled. As has been said, the two plaintiffs in error are the only parties against whom any judgment was rendered. No judgment was ever taken against Ronsheim, though he was in default and judgment should have been taken against him. The judgment against the other parties did not affect him, and it was not necessary that he be a party to the proceedings in error, brought to reverse the judgment against them.

It is claimed that the court erred to the prejudice of plaintiffs in error in sustaining a demurrer to the first defense in the answer of defendants. It averred, in substance, that on September 10, 1880, the will of Ephraim Ronsheim was admitted to probate by the probate court of Hamilton county, by which he gave the residue of his estate, (after payment of one legacy), to his wife for life, and on her death to his daughter, Fanny, absolutely. He appointed Leopold Eisman as the executor of his will, and directed, that during the life of his wife, his executor should invest and re-invest his personal property, so that his wife could receive the income during her life, and that on her death, it be distributed to his daughter. That on September 20, 1880, said executor qualified as such, and in pursuance of the will, he did invest and re-invest said residue of the estate, and that during his life, said Eisman did fully administer said estate as required by the will, and that in December, 1886, Eisman, the executor, died. It also admitted the subsequent appointment of Wm. Ronsheim as administrator de bonis non of the estate.

If this answer is to receive the construction, that as Eisman, the executor of the will, fully administered the estate, and therefore no assets came into the hands of his successor in the trust, and for this reason Ronsheim and his sureties were not liable on the bond, as Ronsheim received no assets of the estate, it might be considered as an argumentative defense. But even if this be so, the sus-

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taining of a demurrer to it was not at all prejudicial to the sureties, for they were allowed to file an amended answer, in which they expressly denied that Ronsheim, as such administrator, received any of the assets of said estate, and the case was tried on the issue thus raised; and in our judgment, the evidence did show that Ronsheim, as such administrator, had received the \$5,200, and applied it to his own use. Even if the amended answer had not been filed, as the parties contested this question before the jury, and offered their evidence in regard to it, and the evidence showed that the administrator so received it and converted it to his own use, there was no prejudice to the defendants from the sustaining of the demurrer. See on this point, also the recent decision of the supreme court in Yocum, Adm'r, v. Allen, 40 Bull., page 24.

It is further urged, that the verdict and judgment were against the law and the evidence, in this, that as Ephraim Ronsheim left a will, on the death of his executor, his successor in the trust would be administrator de bonis non with the will annexed, and as the bond given by Wm. Ronsheim, and his sureties, recited that he had been appointed administrator de bonis non of the estate of Ephraim Ronsheim, that the sureties were only liable for the assets received by him as such, and not as administrator de bonis non with the will annexed. That the sureties, by signing said bond, were not advised thereby that Ephraim Ronsheim had left a will, or that the estate was to be administered in accordance with the provisions of such will, and therefore were not liable for any default of Wm. Ronsheim as to assets actually received by him.

The defect in this claim is, that Wm. Ronsheim was appointed administrator de bonis non simply of such estate, and not administrator de bonis non with the will annexed as he should have been. And the form of the bond, purporting to be signed by him and his sureties, was the kind

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of bond provided by law for an administrator de bonis non, and not for an administrator de bonis non with the will annexed. This was clearly an error of the probate court—but it having been done, and the bond describing him as administrator de bonis non of said estate, and he having received assets in that capacity, it can not properly be said, we think, that the sureties were not liable if default be made in paying it over by such administrator.

By their answers, the defendants denied that they ever executed this bond, and it thus became necessary to any recovery against them, that the plaintiff should show by a preponderance of the evidence that they did sign it. Instead of introducing a certified copy of the bond filed in the probate court, as under section 5, Revised Statutes, might have done, and which under the terms of such section would be prima facie evidence of the execution and existence of such bond, the plaintiff attempted to prove the execution of the original bond by the officer who took it and was an attesting witness thereto, and it must be confessed that as to its execution by the sureties, he was not very successful. About all the officer could say as to them, was, that after the bond was signed by the administrator himself (Ronsheim), it was left with the clerk of the court, and probably some days after this, and perhaps at different times, two persons came to sign as sureties thereon, one representing himself to be M. D. Newberger and the other L. Loeb, and he took from them their several affidavits as to their qualifications as sureties, and had them execute the bond; but he did not know them, and could not pretend to say that they were Newberger, one of the defendants in the case, or L. Loeb, the testator of the other defendant, Mrs. Loeb. This evidence was certainly not very satisfactory, but it was substantially all that was offered on the question of the execution of the bond by the sureties, and there was no attempt to prove that the handwriting of those signing



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the bond was that of the persons who it is alleged signed it, though we understand from the evidence, that they were businessmen of the city. We would hesitate, however, to find, as is claimed by counsel for plaintiffs in error, that the verdict of the jury, that the persons who signed the bond as sureties were the said Newberger and Loeb, was so manifestly against the evidence, as to require us to reverse the judgment on this ground, particularly as against Newberger, who, we gather, was present at the trial, and offered no testimony of himself or others to sustain, on this point, the allegations of his answer.

We do not find it essential to do this, as we are of the opinion that the charge of the court, given in relation to the issues thus made, was erroneous and prejudicial to the defendants, and that the court also erred in refusing to give the special charge asked by them on this point. In the general charge it was said to the jury on this issue thus made—

“The bond has been introduced in evidence, gentlemen, and you will have it with you in the jury-room. This bond is conceded to be the original bond, filed in this case in the probate court of this county. There is no dispute about that. Testimony has been introduced, tending to show that it has likewise been in the possession and custody of the probate court from the time of its execution until the present moment. In view of this testimony, gentlemen, I will say to you, that the introduction of this record and this bond make a prima facie case—is prima facie evidence of the execution and existence of such bond, and in determining this question, you will keep the evidence in mind as the law, as I have given it to you upon the question of the signature.”

We know of no doctrine of the law which will justify this statement. As before stated herein, if a certified copy of the record of this bond had been produced and offered in evidence, under the provisions of section 5, Revised Statutes, it would have been prima facie evidence of the execution of the bond; but this course was not pursued, but

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the original was offered, and an effort made to prove the signature of the defendants thereto by oral evidence. An exception to this charge was duly entered, and the defendants, by special charges asked, sought to have the court state a different rule to the jury. One of the charges so asked, was the following:

"The defendants, Newberger and Loeb, deny that the bond in question was signed by L. Loeb, deceased, and the M. D. Newberger mentioned in the petition. Upon this question the plaintiff must satisfy the jury by the weight of the evidence, that the said identical L. Loeb and M. D. Newberger did sign this bond. For his proof the plaintiff relies wholly on the original bond, and the evidence of Mr. Jones. He does not produce a certified transcript of the record of this bond, and he can not therefore avail himself of the statutory provision made for such case. Relying thus on the original bond, he must produce evidence that will satisfy the jury, by its weight, that the said Loeb and Newberger did actually sign the bond, and if he failed to produce such evidence, the verdict as to M. D. Newberger and Thomas Loeb must be in their favor."

This was refused by the court, and exception taken. We think the court erred in refusing to give it

There were many other exceptions to the rulings of the court, but we see no other rulings on account of which we would reverse the judgment. But for the reasons above set forth, the judgment will be reversed, and a new trial awarded.

*Judge Schroder, for Plaintiff in Error.*

*W. A. Hicks, and Frank B. Finney, for Defendant in Error.*

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C. H. & D. Ry. Co. v. Murphy, Adm'r.

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(First Circuit—Butler Co., O., Circuit Court—April Term, 1898.)

Before Cox, Smith and Swing, JJ.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD  
COMPANY v. JANE MURPHY, ADM'X.

*Railroad--Liability for injury notwithstanding contributory negligence of injured—*

- (1). In an action against a railroad company for damages for causing the death of plaintiff's intestate at a street crossing, where it appears that the deceased went onto the track without looking for approaching trains which he could easily have avoided, he would be guilty of such negligence that no recovery could be had. But where it also appears that the train was running at a greater speed than the city ordinance permitted, and a dangerous speed for that locality without sounding the whistle or ringing the bell continuously as the statute provided; that the men on the engine discovered the man when the engine was about 100 feet from him, and that the danger signal being sounded, they saw the man apparently in a dazed condition hesitating what to do, and they failed to stop the train, which might have been done with proper appliances within eight or ten feet, and thus prevent the collision, if the train was running at the slow rate of speed claimed by them, the plaintiff would be entitled to recover notwithstanding the negligence of the deceased.

*Joint use of street—Rights of public—Duty of Railroad—*

- (2). Where a street is used by the public and a railroad jointly, the public is entitled to the use of any part of the street; but the fact that the railroad is also entitled to the use thereof and thus makes the use by the public dangerous, calls for a high degree of care by those using it to avoid such danger.

*Duty of Railroad towards person in perilous position—*

- (3). If the railroad by its agents or employees in charge of the train, knows a party to be in a perilous position, and might, after obtaining this knowledge, by the use of ordinary care have avoided the injury to him, and did not do so, but carelessly and negligently caused the injury to him, then such party is entitled to recover notwithstanding he imprudently placed himself in the position of peril, if he was apparently unconscious of his danger or from some cause appeared unable to escape it.

*Same—Duty to stop train—*

- (4). It is very common for persons to walk upon a railroad track, even where they have no right to be, and they are often discovered by those running the train at a long distance ahead.

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It is not required that the very moment such person is so seen, every reasonable effort must be made to stop the train. The presumption would be, that such person is possessed of the ordinary senses of mankind, that he can hear and see, and when notified by the whistle or bell of the engine, or the noise made by the train itself, that he will leave the track in time to escape from the threatened danger, and the trainmen are justified in acting upon this presumption until the contrary appears to be the case, using due care in the premises. But if there is anything disclosed which raises a suspicion that the person is deaf, or blind, or helpless, then the obligation on the part of the trainmen to use all necessary and proper care to avoid injury by stopping the train, if necessary to do so, immediately arises.

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Error to the Court of Common Pleas of Butler county.

SMITH, J.

We state our conclusions as to this case as briefly as possible, in view of the many questions of law and of facts which have been argued to the court. In the first place, we may say, that with some doubt in the mind of one of the members of the court, we would not reverse the judgment of the common pleas on the ground that the trial court erred in refusing to grant the motion for a new trial, based on the claim that the verdict was against the weight of the evidence. It seems very clear to us, that the evidence shows, that there was very great negligence on the part both of the plaintiffs intestate, and of the defendant company in their conduct at, and before the time of the injury, which produced the death of the former—in this, that the deceased, when he came down Fourth street from the north at the time, and before he reached Sycamore street on which the train was coming east to cross Fourth street, and before he reached the track and started to walk east thereon, might have seen the train coming for several hundred feet, and thus could easily have avoided any injury to himself. But instead of doing this, it would seem from the evidence, that before he reached the railroad track, or be-

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fore he started to walk in an easterly direction over Fourth street on the track of the railway, he neither stopped, looked or listened, as in the exercise of proper care he should have done and thus could have avoided the injury; and not doing so, he was run down by the train.

On the other hand, the railroad company was clearly negligent in this: It was evidently running its train along and crossing the street of the city at a greater rate of speed than the ordinance of the city provided for—and at a dangerous rate for such a locality. We think the weight of the evidence is, that the whistle was not sounded or the engine bell rung continuously as the statute provided. On this state of fact, both of the parties being negligent, and both contributing to the injury received by plaintiff's intestate, ordinarily there could not be a recovery against the company for the injury suffered by the deceased. But in this case, if we take to be true the positive statements of the engineer and fireman of the train, that for several hundred feet before the train reached Fourth street, its speed was only between four and five miles an hour (which we greatly doubt), and that those managing the engine discovered this old man walking eastward on the track with his back to the train, across Fourth street, apparently unconscious of danger, when the engine was perhaps one hundred and fifty feet from him, and that immediately the danger signal was sounded, and they saw Murphy apparently in a dazed condition, hesitating as to what he should do, and under such circumstances the train was not stopped as might have been done by the use of proper appliances in eight to ten feet, as the evidence shows, and thus prevented the collision if the train was running at the rate of speed testified to by those in charge of it, the plaintiff would be entitled to recover, though her intestate had originally been

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negligent in walking on the track—for in such case the injury might have been prevented.

Second: Was there error in the rulings of the trial court as to the admission or rejection of evidence, prejudicial to the rights of the company? There are so many of those questions raised that it would take a great deal of time to consider them, and we specially refer to those only about which there may seem some question. A great many objections were raised to evidence offered by the plaintiff as to the character of this crossing over Fourth street (which had been placed there by the company, being boards laid lengthwise along either side and between the rails, so that the track might safely be crossed by vehicles passing up and down the street), and that those boards had been constantly used by the public generally as a crossing of Fourth street, there being no crossing there made by the city, as the track crosses the street diagonally. The claim of the company being, that any person using said railroad track as a crossing was a trespasser. We think this claim of the company was not well founded, and that evidence as to its general use by the public was competent. In our opinion, the public was entitled to the use of this part of the street, as well as any other part thereof; but the fact that the railroad company was also entitled to the use thereof, and thus made the use of it dangerous, called for a high degree of care and caution on the part of those so using it, to avoid danger from the proper use of its track by the company.

Objection was made to the introduction of an ordinance passed by the city authorities declaring the crossing of Fourth street, at this point, to be a dangerous one, and ordering the company to erect safety gates there within fifteen days, and directing the proper officer to be notified as directed by the statute. No such notice was ever given to this company as required by law—though there is evidence tending to show

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that the superintendent of the company may have been advised of the passage of the ordinance, and some negotiations or conversation had with some officers of the corporation as to this and other matters — but no steps to carry this out as provided by law, were ever taken by the council or the company. We question very much the competency of this evidence. The most that can be claimed for it is as showing the opinion of the council that the crossing was a dangerous one, and that the company was advised of this opinion. Whether it was prejudicial error, we perhaps might differ about, but we agree that it would have been better to exclude it.

We incline to the opinion also that the evidence of Hays, the conductor, a man of great and long experience in the running of trains, and who was shown to have been present on this occasion, and saw what took place, that in his opinion, the train was stopped as soon as it could have been done, should have been received, and on the evidence such testimony was material. And so of the testimony of Hainer, that on the sounding of the danger signal, it dazzled or excited Murphy, and it seemed as though he could not make up his mind what to do.

In many particulars it is urged, that the court erred in charging the jury, or in refusing to charge as requested. We notice the following: First: That the court erred in charging the jury, "that if you find from all the evidence that the deceased *materially* contributed to the injury that caused his death, then it is your duty to find in favor of the defendant."

It is not disputed by counsel for plaintiff in error, that the statement so made was correct. It is urged that he should also have said, that if he contributed in any degree thereto, that the same result should follow. And it is probable that such is the true rule. But as the statement as it stood was sound, if counsel desired the other statement

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given, he should have asked for it, and not having done so, the objection is not well taken.

The court, at the request of the counsel for plaintiff below, charged the jury as follows:

"If the defendants, in its agents or employes in charge of the train, knew Mr. Murphy to be in a perilous position, and might, after obtaining this knowledge by the use of ordinary care, have avoided the injury to him, and did not do so, but carelessly and negligently caused the injury to him, then the plaintiff is entitled to recover notwithstanding Mr. Murphy imprudently placed himself in the position of peril."

We think the general doctrine aimed to be stated here, is correct. The charge requested, might properly have been more correctly and clearly stated, by an addition thereto after the words, "in a perilous position", of these, or words conveying the same idea, "and apparently was unconscious of his danger, or from some cause appeared unable to escape the threatened danger". For it can not be questioned that a man on the railroad track, not far in front of a rapidly moving train, is in a perilous position, and particularly if unconscious of its approach; and for this reason, the duty is imposed upon those managing the train to use care in preventing injury to him, and in case of injury might be liable for the damage which resulted. But in this case, the court, of its own account, proceeded further to say in addition to the charge asked:

"The court will give you that charge; it has substantially given you that before. It was the duty of the railroad employes, when they saw Martin Murphy, to have used every reasonable means in their power to stop the train and thereby save his life. And whether they could have stopped the train or not is a question for you to decide from the evidence you have heard."

In this additional statement at least, we think the court went too far and stated the law too strongly against the



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defendant, and assumed the province of the jury in deciding a question of fact against the company. There was evidence, as has been said, tending to show that the train was running between four and five miles an hour, and that by the use of reasonable and proper means, it could be stopped within ten to twelve feet when running at that speed on such a grade. That those running the train discovered Murphy on the track one hundred and fifty feet ahead of the train. The court then says to the jury, that when they saw him, it was their duty to have used every reasonable means in their power to stop the train—and this without any reference to the fact, whether the persons running the train had any good ground to believe that Murphy was unconscious of its approach, or that he was from any cause unable in time to step from the track and thus escape all danger of a collision with the train. We do not understand that there is any principle of law which justifies this statement to the jury. It is a matter of general knowledge, that it is a very common thing for persons to walk upon a railroad track, even where they have no right to be, and that they are often discovered by those running the train at a long distance ahead. Can it be claimed to be the law that the very moment such person is so seen, that every reasonable effort must be made to stop the train? This would be unreasonable and absurd. The presumption would be, that such person is possessed of the ordinary senses of mankind—that he can hear and see, and when notified by the whistle or bell of the engine, or the noise made by the train itself, that he will leave the track in time to escape from the threatened danger, and we understand the law to be that the trainmen were justified in acting upon this proposition until the contrary appears to be the case, using due care in the premises. Of course, if there is anything disclosed which raises a suspicion that the person is deaf or blind or helpless, then the obligation on the part of the trainmen to

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use all necessary and proper care to avoid injury by stopping the train, if necessary to do so, immediately arises. In the case of Street R. R. Co. v. Cavagna, 6th C. C., 606, this court held that a charge requested by the company to be given to the jury, "that the street was not a play ground for children, and that the gripman was not bound to anticipate that children on the side walk would suddenly run upon the track; or even if he saw a boy running towards the track, that it was not absolutely his duty to stop the car at once. That he might exercise his judgment to determine whether the boy would see the car and stop. And that after he saw him, and in the exercise of his judgment, he acted as a reasonably prudent gripman ought, and made every effort in his power to avoid the injury, the company would not be liable", was a proper charge, and ought to have been given.

It is also urged, that the following charge by the court to the jury, was erroneous and prejudicial:

"The railroad company has a right to use its track and to cross Fourth street; the general public have a right to use Fourth street and cross the track. Upon that proposition, the court charges you that the rights of the respective parties are equal. The general public has as good a right to cross over the track at Fourth street as the railroad company has to cross Fourth street on its track—no better, no worse. They are both alike".

In the case already cited from the 6th C. C. Rep., the court had occasion to consider the correctness of a charge, somewhat similar. There the court, without any qualification, charged the jury as follows:

"And in this connection, I may say, that upon public streets, any person has the right to walk, either on the pavement, or on the part usually used by vehicles, or upon the part of the street occupied by the street cars."

The reviewing court held:

"That this broad statement was calculated to mislead the

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jury. There is no doubt but that foot passengers have a right to walk upon the roadway of the street, or even upon the tracks of a railroad laid thereon, under certain circumstances. They are compelled to cross such streets and tracks, and may walk along the same instead of the pavement ordinarily used for this purpose, if necessary, or proper under the circumstances to do so. But this is not to be done as against the ordinary rights of others, and when used in this way, much greater care and caution are required of the footman, than if he were in the ordinary footway, for the reason that such part of the street is also rightly and principally used by teams, vehicles and cars. In this case, where one of the issues was whether the defendant, under all the circumstances of the case, was running its cars with ordinary care, the jury might well have understood, that in the opinion of the court, the plaintiff was rightfully in the street and on the track, and that the fault was wholly with the defendant."

The objection there made, applies with equal or greater force to the language used by the trial court in the case at bar.

It is also claimed, that the trial court erred in the charge given to the jury as to the burden of proof being on the defendant below, to show negligence on the part of the plaintiff's intestate, which contributed to the injury. The court spoke on this point several times. In the general charge he said:

"The burden of proving that he (the plaintiff) materially contributed to his own death is upon the defendant; that is, the defendant must show to you by a preponderance of the evidence, that the deceased contributed to his own death. The burden, upon that point, is upon the defendant." And in the third special charge, asked by the plaintiff and given by the court is this language: "The burden of showing negligence on the part of the defendant, its agents or employes is upon the plaintiff, and the burden of showing negligence on the part of Mr. Murphy is upon the defendant."

This is all that appears in the charge of the court on this point.

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The rule on this point is clearly and explicitly stated by the supreme court, in the case of B. & O. R. R. Co. v. Whitacre, 35 Ohio St., 627, as follows:

"In an action for injury occasioned by negligence, where the circumstances require of the plaintiff the exercise of due care to avoid the injury, and his testimony does not disclose any such want of care on his part, the burden is upon the defendant to show such contributive negligence as will defeat a recovery. But if plaintiff's own testimony, in support of his cause of action, raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption."

Now, in the case at bar, where the plaintiff's own evidence did very clearly raise a presumption of negligence on his part which directly contributed to the injury, by his going upon this dangerous crossing when he must have known that trains frequently ran over the track, without having once looked to see whether a train was approaching, though he could have seen the track for perhaps four hundred feet if he had looked for it—an old man with the heads of two hogs slung upon his shoulders and probably interfering with his vision and hearing, and his ability to escape, can it be said that the court was justified in saying that the burden of proving his contributory negligence rested upon the defendant? It was a case which clearly called for the whole of the law as announced by the supreme court in the case cited to be given to the jury. The claim may be made, that the law as stated by the court was the general rule, and that if the other side wished the court to give the limitation upon it, they should have asked for it. But the difficulty is that under the circumstances disclosed, the doctrine stated was not the law of the case, and the giving of it was erroneous and prejudicial to the rights of the defendant.

It is also claimed, that the court erred in giving the fifth special charge asked by plaintiff as modified by it, viz:

"While it was the duty of Mr. Murphy to exercise the care a man of ordinary prudence is accustomed to use under like

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circumstances, he had a right to presume that the defendant would not run its train through said city and over said crossing any faster than the ordinance of the city of Hamilton provided."

The correctness of this charge seems to be established by the decisions in this state, but the court added the following to it, and then gave it:

"He had a right to assume a train passing over that road would not be run at a speed greater than five miles an hour, and he had a right to govern his conduct accordingly."

How far "had he a right to govern his conduct accordingly"? Suppose he saw the train approaching at a rate of speed of twenty-five miles an hour. Had he still a right to proceed on the track as leisurely as if it were only running at five miles an hour, and suffer himself to be run down? The statement was incorrect, and was liable to mislead the jury.

Complaint is also made as to the sixth special charge given to the jury at the request of the plaintiff as modified by the court. The charge asked, was this:

"A person acting with ordinary care is not guilty of contributory negligence, because he fails to anticipate and protect himself against the negligence of another".

This was probably good law, but was modified by the court by adding thereto the following:

"A party has a right to assume that another will do his duty, and has no right to anticipate that he will do otherwise. And so in this case, if you find that Mr. Murphy is crossing the road at that place depended upon the fact that the train was only allowed to run at the rate of five miles an hour, he had no right to expect or anticipate it would be run faster than that."

We know of no principle of law that would debar him of the right to expect or anticipate this, though he may not be guilty of contributory negligence if he fails to do so. The addition was uncalled for, and probably was erroneous, but may not have been prejudicial.

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Wilhelm & Son v. Parker, Jr., Receiver.

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There are other minor exceptions to the charge, as for instance, that the court erred in saying to the jury that it might give any damage it pleased so that it did not exceed \$10,000, and that in estimating the damages the jury had a right to look at his advice to his children, his counsel to them, his control over them, and in stating that all these might be considered by the jury for the purpose of fixing the damages to which plaintiff might be entitled to recover. We do not regard these statements to the jury as being exactly proper, but as in the charge the court clearly instructed the jury that the plaintiff was only entitled to recover for the pecuniary damages suffered by those entitled to the fruits of the recovery, it is probable that any error therein was thereby cured.

But on the other grounds stated we feel constrained to reverse the judgment and award a new trial.

*Millikin, Shotts & Millikin*, for Plaintiff in Error.

*Morey, Andrews & Morey*, for Defendant in Error.

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(Third Circuit—Defiance Co., O., Circuit Court—Oct. Term, 1898.)

Before Day, Price and Norris, JJ.

A. WILHELM & SON v. THOMAS PARKER, JR., Receiver of  
the Mutual Fire Insurance Company of Chicago, Ill.

*Mutual Insurance — Cancellation of policy and premium note—  
Liability to creditors—Jurisdiction of foreign court —*

(1). Defendant was a policy holder in a mutual fire insurance company. By the terms of his premium note and by the stipulation of the policy, he was bound for indebtedness of the company incurred during the life of the policy. The policy was cancelled, and his premium note was cancelled, and surrendered to him. After this a receiver for the company was appointed;

Held, That although defendant is not excused from liability for indebtedness incurred during the life of the policy; yet his relation to the company is not such that he is represented by the receiver and the court thereby acquired jurisdiction of his

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person in a proceeding to wind up the affairs of the company, and to make assessments to pay its debts.

*Action on foreign judgment—Necessary averment—*

- (2). In an action to recover upon the judgment of a court of a sister state the jurisdiction of the court from which the judgment emanates must be affirmatively asserted in the petition. Being a basis fact of remedy, it is met by a general denial; and when so denied the burden is cast upon the plaintiff to establish it by proof.

*Same—Proof of jurisdiction—*

- (3). When it appears upon the face of the record that the court of a sister state from which the judgment emanates took cognizance of the action under authority conferred by legislative enactment, and its jurisdiction is denied; it cannot be presumed from the mere fact that the court assumed to act, that it was exercising powers within the scope of its statutory jurisdiction.

*Presumption of jurisdiction over non-resident—*

- (4). Presumption of jurisdiction of a superior court of a sister state in an action on its judgment, as in the case at bar, extends to jurisdiction over the person of one within the territorial limits of the process of the court, and to those procedures which the common law recognized as within the radius of its adjudications.

*Same—Jurisdiction to be pleaded and proved—*

- (5). Jurisdiction of subject matter which is conferred by statute is not presumed. Statutory jurisdiction of a court of a sister state, as well as the statute conferring it, are not subjects of judicial cognizance, but must be pleaded, and in the face of denial must be proved.
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Error to the Court of Common Pleas of Defiance county.  
NORRIS, J.

The defendant in error, Thomas Parker, as receiver of the Mutual Fire Insurance Company, of Chicago, brought his action as such receiver in the court of common pleas of Defiance county, Ohio, to recover upon two certain premium or deposit notes—so called—which plaintiffs in error, who were lately partners, had executed to said company as such partnership firm, and which were made in compliance with the conditions of two certain policies of fire in-

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surance, issued by said company, covering risks owned by said partnership firm.

The receiver in his amended petition in the court below alleges these facts, and further avers that said policies were issued and accepted by said Wilhelm & Son, and each policy contained the condition and agreement that "the insured becomes a member of this company, and agrees to pay the premium annually during the life of the policy, and in addition thereto such sums not to exceed five times the amount of the annual premium, at such time and manner and by such installments, as the directors of the company shall assess and order pursuant to its charter and by-laws and the laws of the state of Illinois.

The company was chartered and organized under the laws of the state of Illinois.

The notes were dated, one March 22nd, 1886, for \$500, the other dated February 1st, 1887, for \$300, and are promises to pay by installments at such times as the directors of the company may order and assess for losses and expenses of said company pursuant to its charter and by-laws.

The dates of the policies correspond with the dates of these notes respectively, and were then issued.

The plaintiff says, that said company had before the making of these notes, and before issuing said policies of insurance, complied with the requirements of the laws of Ohio, enabling it to do business in this state, and had received its certificate from the proper authority in that regard; and at the date of these policies was so authorized to do business in Ohio, and so continued during the effect of the policies which covered the period respectively from the date they were issued until about the 4th day of August, 1890.

About the 4th day of August, 1890, said policies were, at the solicitation of defendants, cancelled and delivered up to



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said company, and these premium notes were to defendants returned.

The plaintiff says, that at the time the policies were so returned to the company, and the notes delivered up to defendants, said company was insolvent and unable to pay its debts and losses.

That the policies as a part thereof had this condition: "That liability as to prior losses and expenses shall not terminate until all assessments levied for losses and expenses arising during the life of said policy, are fully paid."

That losses and expenses had accrued during the life of said policies for which defendants were liable, and assessments for the payment of which had been duly made.

That by a proceeding had in the circuit court of Cook county, Illinois, after said policies and notes were surrendered up, and by the consideration of said court, the plaintiff was appointed receiver of said company, and under the direction and guidance of that court the assets and liabilities of said company were marshaled, and an assessment was made upon its members to meet the deficiency and pay the debts of the company; and in that proceeding, and by the consideration of that court, defendants were adjudged to pay as the assessment upon the first note and policy, the sum of \$106.79, and upon the second note and policy, \$108.20. And that by the decree and order of said court, it was considered that if said payments were not made within thirty days after demand of payment, then the receiver should collect all remaining unpaid of said premium notes. And plaintiff seeks to recover against the defendants the sums of \$450 and \$270, in the aggregate \$720, being the full unpaid residue of said premium notes.

The various steps leading to this condition, are set out at great length in the petition, and also is stated the fact that the company changed its name from time to time, as

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its members desired, until was finally chosen, the name under which it figures in this action.

To each cause of action in this amended petition a demurrer was filed. The demurrer was overruled.

After the filing of this amended petition, one Longworthy was appointed receiver of said company, to succeed Parker who had resigned, and he comes by supplemental petition and makes known that fact, etc.

Various motions to the pleadings and to the action were filed by the defendants, and were overruled by the court.

The defendants finally answer the amended petition, and deny that the Mutual Fire Insurance Company of Chicago is a corporation organized under the laws of the state of Illinois. Deny that it received its name by any change from any former name or names, and deny that it was ever authorized to carry on business in Illinois or in Ohio. Defendants admit that the notes and policies were delivered up and cancelled.

Defendants aver that while said company was solvent and competent to legally do so, it settled and adjusted these notes and policies; in which settlement were included all the liability to respond to assessments under them, and that the notes and policies were cancelled and released and the notes were returned to defendants under and in accordance with the provisions of this settlement. And that defendants were by said settlement forever released and discharged and ceased to be members of said company, and ceased to be liable by reason of such membership.

The defendants specifically deny that the plaintiff was appointed receiver by the circuit court of Cook county, Illinois, or by any court that had jurisdiction so to do.

And they deny that the circuit court of Cook county, Illinois, had jurisdiction to appoint plaintiff receiver, as alleged in the amended petition. And also by their general denial, which denies all else in the amended petition

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not admitted, defendants deny that the circuit court of Cook county, Illinois, had jurisdiction of the persons of the defendants; and deny that said court had jurisdiction and power to do, and cause to be done, the things named in the amended petition, and to adjust and determine the assessment, and adjudge and order and make adjudication in relation to the matters and premises, as claimed in the petition and as therein set forth.

The supplemental petition of Longworthy is denied by defendants.

Plaintiff replies and denies the settlement as pleaded in the answer.

An answer in abatement had been filed before the issues were thus made up, which alleged as its grounds, that Parker has ceased to be receiver of the Insurance Company; that for that reason the trial court had lost jurisdiction and the action of plaintiff abated, and that in its nature it is not such an action as can be revived in favor of Parker's successor.

A demurrer to this answer was sustained.

The issues thus presented by the amended petition, the answer thereto and the reply, were upon the evidence submitted to the trial court without the intervention of a jury, and the result is, the finding for the plaintiff. Defendants' motion for a new trial was overruled, and judgment was entered upon the finding of the court. A bill of exceptions preserving all the evidence was allowed by the trial judge, and the case is here urged upon petition in error for reversal.

The assignments of error are:

First: The court erred in its admission of evidence offered by the plaintiff and objected to by the defendants.

Second: That the finding and judgment of the court are not sustained by the evidence, and are against the law.

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Third: That the court erred in overruling defendants' motion for new trial.

The other assignments of error are:

Fourth: That the court erred in overruling defendants' motion to make the petition more definite and certain.

Fifth: That the court erred in overruling defendants' motion to strike the amended petition from the files.

Sixth: Error in overruling the demurrer to the amended petition.

Seventh: Error in refusing to dismiss the action and in entertaining the motion of Longworthy to revive the action, and in granting said last named motion.

Eighth: Error in granting Longworthy leave to reply.

Ninth: Error in striking the reply of Parker from the files and in sustaining the demurrer to defendants' answer in abatement.

Tenth: Error in overruling motion to procure certain records.

Eleventh: Error in entertaining jurisdiction to try the case.

To none of the matters so assigned for error, have exceptions been saved, other than to complaints:

Tenth: That the court overruled defendants' motion to produce certain records;

First: Error to admission of evidence offered by plaintiff.

Second: That the finding and judgment are not sustained by the weight of the evidence, and are contrary to law;

Third: Error in overruling defendants' motion for new trial.

As to the motion to produce records, there is nothing in the bill of exceptions indicating what the record is that defendants desired to be produced. and hence this court is not informed how the case was affected, or what bearing the failure to produce may have had on the event of the action, and find no error in this regard.

As to the admission of evidence over defendants' objection, the record discloses nothing to the prejudice of de-

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fendant, that will warrant the conclusion that the trial court erred in admitting evidence offered by the plaintiff.

So there remains to be determined by this court only the question as to whether the finding of the court was against the weight of the evidence, and the judgment contrary to law, and whether for this reason there is error in overruling defendants' motion for new trial.

It is conceded that at the date of the proceedings in the circuit court of Cook county, Illinois, these policies had been cancelled and these notes had been returned to the defendants; and all this, before the appointment of any receiver for the company. This action therefore, is not upon the notes, but is founded upon the decretal order of the circuit court of Cook county, Illinois, authorizing and commanding its receiver to make the assessment declared in the petition, and ordering action to enforce its decree.

It is not claimed that the defendants were residents of Illinois, or were within the territorial limits of Illinois, at the time that proceeding was instituted, or at any time since, and it is not contended that jurisdiction of their persons was acquired by any service of the process of that court upon them, or either of them.

But it is claimed that the plaintiff, in his character of receiver, represented the company, and represented its members, and that through the receiver, and by virtue of his standing in the place of the corporation, and the associates who constituted it, jurisdiction of the person was obtained. We are not of the opinion that this condition prevailed in this case.

It cannot be claimed that defendants, at the time of the appointment of the receiver and of the proceedings in the circuit court of Cook county, occupied any relation to the company, other than that of debtors to the creditors of the

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company. They had agreed in their policies to remain liable for debts which accrued during their membership. They were not in any sense of the term members of the company; they could not be heard as members; they had no voice in making its officers, or in dictating its management; they were not interested in its earnings, they were no part nor parcel of it. They owed its creditors under a contract with it, the terms of which in that regard did not cease with severance from it.

In this view it is the opinion of the court, that these defendants were not parties to the proceeding and judgment in the circuit court of Cook county, Illinois, and are not bound by it. They had ceased to be members of that company, in a sense that its receiver could represent them in an action, and thereby make them parties to the action. The receiver was not their representative; he was their adversary.

But whether they were so far members as to be represented by the receiver, or were not; or had they been before that court in fact in their own proper persons, the finding of the trial court is not sustained by the weight of the evidence.

There is not proof warranting this court in assuming that the circuit court of Cook county, Illinois, was a legal tribunal having jurisdiction to do that which the petition claims was done in the proceedings had before it, and upon which, and by the strength of which, he asks relief here.

The judgment of a court of general jurisdiction in a sister state, possesses here the character of a contract liability with all defenses which might or ought to have been pleaded there to the merits eliminated by that adjudication.

In this case it does not appear, that the jurisdiction of the circuit court of Cook county, Illinois, depended upon any fact directly and necessarily decided by that court in that proceeding.

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This is not a judgment pleaded in bar, but a judgment pleaded in support of recovery.

The answer in this case is not a plea of *nul tiel record*, but an attack upon the validity of the proceeding itself.

The laws of a sister state conferring power upon its courts, when the scope of the power thus conferred is put in issue as in the case at bar, becomes a fact in issue, and must be sustained by proof as any other fact upon which the event of the action depends.

In this case, though proof might have been offered, and though the way is pointed out by which such proof can be made, it was not made and not offered.

The subject and trend of this proceeding of the circuit court of Cook county, Illinois, stamps it as not of the character known to the common law jurisdiction of courts. In a case as the one at bar, the jurisdiction of the court from which the judgment emanates is only presumed to extend to those matters which courts acting under the common law, are wont to recognize and determine.

The power of the circuit court of Cook county, Illinois, to take cognizance of such a controversy as that proceeding discloses, should be made to appear by a profert of the laws of that state conferring the power and fixing the status of the court and the scope of its jurisdiction in that regard. Revised Statutes, section 5244.

Section 905, of the laws of the United States, determines how the records and judicial proceedings of courts are to be authenticated and rendered competent as evidence and admitted as evidence, in the courts of any other state. And further provides that when so rendered competent by due attestation and authentication, such proceedings shall have the same faith and credit given to them in the courts where so admittted as they have by law or usage in the courts of the states from which they are taken.

And when such records are so presented, and admitted in

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the absence of denial, the jurisdiction of the person and of the controversy, and power of the court from which they emanate to take cognizance of the action and to determine the rights of the parties, is deemed to exist, because the validity and virtue of the proceeding and its effect is asserted in the petition, and not traversed and made an issue in the case by answer.

The foundation of the plaintiff's claim, and the salvation of the case rests upon the effect which that proceeding in the circuit court of Cook county, Illinois, has by law or usage in the courts of that state.

The plaintiff claims, that the proceeding would have the effect in the courts of Illinois, to bind the defendants to this action, and for that reason that it has the same effect here.

The plaintiff asserts that the court from which the record offered in evidence in this case, was taken, was a court that had authority to make the adjudication, and that the action of which that record is the evidence, was one in its nature within the scope of its jurisdiction and contemplated in the purpose of its organization.

This is a fact when so asserted which invites denial, and is denied, and is susceptible of proof; of it proof is demanded, and the burden of sustaining the assertion is upon the plaintiff.

Presumption of jurisdiction of a superior court of a sister state in an action upon its judgment as in the case at bar, extends to jurisdiction over the person of one within the territorial limits of the process of the court, and to those procedures which the common law recognizes as within the radius of its adjudications.

The limit of such jurisdiction, and the effect of such adjudication, is the same in states in which the common law prevails, and courts of such states are presumed to understand their force and purport. But the extent of power



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authorized by legislative enactment, and the effect of proceedings and judgments under such powers, are not presumed to be within the knowledge of courts of another state, and hence may be put in issue, inquired into and explained.

So that jurisdiction of a subject matter which is conferred by statute is not presumed. The statutory jurisdiction of a court as well as the statute conferring it, are not subject of judicial cognizance, but must be pleaded, and in the face of denial must be proved. The judgment of a superior court, in a controversy in which jurisdiction is conferred by statute, is in character no stronger than the judgment of an inferior court of a sister state. 161 Mass. 111, 25 L. R. A., 804.

The proceeding had in the circuit court of Cook county, Illinois, and the judgment upon which the action here is founded, were not in the exercise of the jurisdiction which at common law, courts of general jurisdiction have the power and right to exercise.

It is a jurisdiction that, if possessed at all, is necessarily conferred by the legislative authority of the state where exercised. And the law clothing the court with power, is neither pleaded nor offered in proof in this action.

In such case it cannot be presumed that the court had jurisdiction because it assumed to exercise it. Nor can it be supposed merely from the attested copy of the record of the proceedings in the circuit court of Cook county, Illinois, offered in evidence here, that that "court had jurisdiction because the page proffered is its record and that the paper offered is its record and imports verity because the court had jurisdiction." A conclusion so determined would, to say the least, be a very lame one.

We cannot accept as proof of jurisdiction and evidence of power and assume the jurisdiction of that court to exist, from the naked proceeding of that court, the legality and

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force of which is challenged because, and upon the ground, that the court was outside of and beyond its power in attempting to entertain the action, and was not authorized by the laws of Illinois to take cognizance of the subject matter of the controversy. And this being all that is offered to meet defendants' denial, we deem the proof in that respect insufficient to support the finding in the plaintiff's favor.

I might here gratuitously remark, that the judgment, inasmuch as it orders the collection of three or four times the amount necessary to meet defendants' liability, is so far repugnant to the instinctive principles of justice, that if it were the judgment of the court of an alien state, it would, for that reason, not be considered the basis of remedy.

However, for the errors already designated, the judgment and finding of the trial court are set aside, at the costs of defendants in error, and the case is remanded for execution and new trial.

*Henry Newbegin*, for Plaintiff in Error.

*B. B. Kingsbury*, and *C. W. Greenfield*, for Defendants in Error.

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(Sixth Circuit—Lucas Co., Ohio Circuit Court—Oct. Term, 1893.)

Before Bentley, Haynes, and Scribner, JJ.

WILLIAM CHERRY v. AGNES C. HOWE, ET AL.

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*Dedication—What requisite to constitute—*

- (1). To constitute a common law binding dedication of ground to public use, there must have been an intention to dedicate and an actual dedication on the part of the owner, and an acceptance by the public, which may be shown by circumstances.

*Same—Twenty one years' use by the public—*

- (2). Where an owner in building a barn on his lot left a space of eight feet at the end of his lot open, for the convenience of himself and his tenants merely, the fact that such open space was also used by the public without open objection by such owner to such use, will not be sufficient to show an intention to dedicate such space to the public for all time to come, although such condition may have continued for more than twenty-one years..

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BENTLEY, J.

Plaintiff, in his petition, alleges that he is the owner of the southwest thirty-two and one-half feet of lot 458, Port Lawrence division, of the city of Toledo, Lucas county, Ohio, which is a lot lying between Jefferson and Madison streets, having a frontage on Huron street, in this city. He gives a description of it, and avers that he has been the owner of it in fee simple since January 31, 1876, and says:

“Said lot extends back a uniform width to a depth of 120 feet to an alley of the width of about sixteen feet; that said alley extends from Jefferson street in said city a uniform width towards Madison street through the center of the block bounded by Jefferson, Huron, Madison and Erie streets in said city.”

He further says that it has been dedicated to the public use, and that it has been open and used as a public highway and by all the owners of lots abutting thereon more than twenty-one years. He says also that he bought said property upon the faith and with the understanding that the alley had been permanently dedicated to public uses, and been used by the public generally.

He further states that he is interested in keeping said alley open as a means of access to the rear end of his said lot and for the accommodation of the public. He avers also in his petition that said alley has been accepted as a public highway and treated as such by the city authorities during all the times mentioned, and he then proceeds to state that the defendant, who is the owner of lot 456 and part of 457—lot 456 fronting on Huron street and abutting on Jefferson street—has proceeded to erect an obstruction across the alley, or a portion thereof, in order to prevent the plaintiff and the public generally from passing along the alley, and that by reason thereof they are hindered and delayed in doing so; that he has sustained injury; that he has no remedy at law, and he prays that defendant may be ordered to abate

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the nuisance and be enjoined from erecting any nuisance, and from interfering with the passage of the plaintiff and the public along said alley.

Defendant files an answer, in which he denies each and all of the allegations in the petition contained.

The case was submitted to us upon written briefs and upon evidence that lies in statements and agreed statements, in the depositions of parties, and in sundry and divers documentary evidence. The briefs are very full, and embrace a great many cases, and we have endeavored to give them very full consideration.

The facts, in general, are substantially these: Williard W. Howe, in 1853, became the purchaser of lot No. 456, and proceeded during that summer to erect upon it a residence, completed in 1854, when he entered into occupation of it, and it remained his place of residence and that of his family, until a year or two ago. In 1857—I think it was—he purchased the adjoining lot, No. 457, but having prior to that time erected upon the rear end and upon the line of the lot, of his lot 456, a barn, he moved the barn and swung it around, as he says, so that it stood when he had adjusted it, in part upon lot 456 and in part upon lot 457, and upon a line eight feet from the rear end of the line of his lots. His testimony has been taken (by deposition), and he states therein that he did this for the purpose of enabling him to reach the barn himself more conveniently, and for the convenience of his tenants. He has also erected sheds in connection with the barn, and some outbuildings, and leased them to the United States Express Co. who have occupied it for some years; that that building was placed in the situation it was in for the more convenient use of himself and of those tenants—the Express Company, their horses, wagons, etc. He further says, by his testimony (of himself and his son), that Jefferson street since that time has been filled up and that a sidewalk has been constructed

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along up Jefferson street the whole length of his lot, and an eight-foot stone sidewalk, which was completed a few years ago, and for which he was assessed the whole depth of his lot; that the sidewalk was uniform in width to its end, and that afterwards a change was made in its form by reason of this supposed alley.

His son testifies that by reason of the walks going along this alley they were injured by it, and for that reason they proceeded to erect the obstruction complained of, and not from any malicious intention.

It is shown also that the assessments made from time to time by the city authorities for the improvement of Jefferson street have been levied upon the property to the full depth of the lot.

It appears by the testimony of plaintiff that he became the owner of the lot upon which he resides in the summer of 1883, which is described as the south thirty-two and a half feet of lot 458, and says: "My lot fronts on Huron street and runs back a uniform width of thirty-two and a half feet to the alley, which is about sixteen feet wide. Eight feet of this alley belongs to my lot. In taking my deed the lot was described as running back to the rear end of said lot, because I considered it necessary to so describe it in order to give me the benefit of the eight feet in case the alley should be ever vacated for any reason;" and he states that within the last three years he has erected upon the rear end of his lot and upon a line eight feet back from the rear end of the lot a brick—I think it is—barn, costing about \$1,000; that at the time he purchased the lot he relied upon the fact that there was, as he supposed, a public alley there, and that he was told by sundry persons that there was a public alley there, but he was never told so by W. W. Howe or by any of the defendants. The testimony of some other parties was taken showing that he bought the lots supposing that there was an alley there, and that one of them built a barn in the situation that I have stated.

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It further appears that originally as they had used the alley they had been in the habit of coming through to Madison street; but sometime, as I understand it, about the year 1876, the supposed alley adjoining Madison street was closed up by Dennis Coglin—who owned property there to the depth of 100 feet; and by the joint action of himself and the heirs of the Walbridge estate, who, some years ago, built a brick block adjoining his property, and from that day there never has been any passage-way through there, and that the same has remained closed, and that the residue of the supposed alley is simply a pocket extending from Jefferson street down to the line of his lot.

In 1875 a resolution was passed by the common council of the city of Toledo to open that alley to the width of sixteen feet; and, in 1876, the council rescinded that resolution and passed a resolution to open it to the width of fourteen feet, and such proceedings were had, amounts were awarded to the respective owners for the value of their property, and that the city failed to pay within the time required, requiring the parties to take certificates, which they refused to do, and thereupon the city refused to advance the money, and the proceedings were dropped.

It further appears that in 1866, Richard Mott, being the owner of lot 455, which is a lot fronting on Jefferson street and adjoining this alleged alley, made a dedication of the alley eight feet in width adjoining or off of the lot, and extending across the rear end of that lot and some other property that he owned out to Erie street, which still remains, as we understand it, a public alley.

This, I believe, covers all the substantial facts that appear in the evidence.

It will be seen by the statement of facts that there never was any dedication, in the manner provided by the statute—no deed or plat was made of the real estate as required, and that whatever dedication there was, was a common law dedication—if there be one.

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It further appears—as I have cited already—that the plaintiff, in purchasing his lot, never made any inquiry of W. W. Howe, or of any person claiming to be the owner of these lots, as to whether there was an alley there or not, and the question for us to determine is, whether, under the facts of the case, there is evidence sufficient to constitute a common law dedication which will be available to this plaintiff.

A statement of some of the characteristics of a common law dedication has been made in the case of *Lessees of Incorporated Village of Fulton v. Mehrenfeld*, 8 Ohio St., 440, and it is there stated that dedications of land in general operate by way of estoppel, and not as grants or transfers of an interest. It is further held that a statutory dedication is in the nature of a grant; that the estate is vested by way of a grant, and not by way of estoppel. On page 446, the court further state, that:

“To constitute a binding dedication of ground to public uses at common law, there must have been an intention to dedicate, and an actual dedication on the part of the owner, and an acceptance on the part of the public, which may be proved by the circumstances of the case.”

I should say, in passing, that that is put in that form in regard to the pleadings, because this particular action was brought in ejectment by the village of Fulton against certain parties, to obtain possession of the street. And it is expressly stated in this decision that there may be extended to the owners of the abutting property a right on the part of abutting property to restrain persons from closing a street—when the city would have no right in the street. I may say, in passing, that there is no evidence that the common council has in any manner recognized this alley as a public highway. They have never improved it. Indeed, it would seem that in 1875, they then recognized it so far as they could, as belonging to the property owners. be-

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cause they passed a resolution to condemn it for the purpose of an alley.

It is then as between this plaintiff and the defendants, that we shall discuss the case.

It is said in 8 Meeson & Wellsby, that the use of it by the public is simply evidence of the fact of dedication, and evidence only; and they further say that any act on the part of the owner of the property showing that he had not intended to dedicate it, is of far more importance as a matter of evidence than the fact that the public have been allowed to pass along it.

In regard to the statement made in the testimony of Mr. Howe, how far there was any secret intention on his part to dedicate, we need not inquire. Objection is taken to some of his evidence in respect to statements as to the purposes for which he moved his barn back and left the right of way open. We think, however, that the facts sufficiently appear by his evidence that at the time he moved his barn back and placed the foundations along adjoining the line of the barn—eight feet from the rear end of his lot, that he did it for the purposes as he states in his deposition, to-wit, for the purpose of enabling himself and his tenants to reach the barn and to use it—the Express Company for the purpose of storing its wagons and keeping its horses and giving them an opportunity to pass in and out of Jefferson street to the barn.

We are of the opinion that, under the testimony in this case, there is nothing in the acts of Mr. Howe that shows that he ever intended to dedicate this property to the use of the public—that he intended to give it to the public; we think everything that was done by him is consistent with his statements in regard to the facts of the case at the time, to-wit, that he was simply opening that for his own private use and that of his tenants. It is true that he permitted persons to pass along the street from time to time, and it is



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further true that he never made any public objections, save in one or two instances where persons were using the street in such a manner as that it became a nuisance in there by allowing cattle to run in and out there, and perhaps some poultry, and allowed cattle to stay there and turned them into his lot. Neither did he do anything, save and except that he left the road open, and induced any of these parties who were making purchases to believe that he had dedicated that property to the use of the public, and, before there should be an estoppel decreed against him, or before he should have been held to have lost his property, it is very clear that there should be such acts of dedication as to show that at the time the street was opened upon his part he had a clear intent to dedicate it to the use of the public for all time to come. We do not think that has been made out, and, in view of the principles to which I have referred we hold that he has done nothing to estop himself from claiming the right to put his fence out to the limits of the lots, and the decree for injunction will therefore be refused.

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(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1898.)

Before Cox, Swing and Smith, JJ.

**THE MERCHANTS' NATIONAL BANK v. THE OVERMAN  
CARRIAGE COMPANY.**

*Purchase by corporation of its stock—When void—Continued liability of stockholder—*

- (1). A resolution by a corporation authorizing the purchase of a part of its own stock by B. as trustee for the company, to be paid for with notes of the company, is a purchase of the stock for the company.
  - (2). Such a purchase by a corporation from two of its officers "in consideration of their proposed retirement", does not come within the exception to the principle of law that a company cannot deal in its own stock; the purchase was invalid, and those who attempted to sell did not cease to be stockholders.
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**Merchants' National Bank v. Overman Carriage Co.**

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Appeal from the Court of Common Pleas of Hamilton county.

SWING, J.

The point in controversy in this case is whether Peter Junghaus and Bernard S. Fallon are stockholders in the Overman Carriage Company.

On June 30, 1893, they each owned fifty shares of the capital stock of said company. On that date, at a meeting of the board of directors of said company, consisting of Messrs. Rossiter, Burrows, Fallon and Junghaus, the last two being the parties above named—Mr. Junghaus acting as secretary—Mr. Burrows made a motion which was carried, the president, Mr. Rossiter, not voting. The motion was as follows:

“That in consideration of the proposed retirement of Mr. Fallon, as vice-president, and Mr. Junghaus, as secretary, Mr. G. H. Burrows be authorized to purchase their stock as trustee for the company, paying for the same—giving notes to the order of the company payable five hundred dollars per month, with interest at six per cent. The president is authorized to endorse said notes, and the company to pay the same as they mature, holding said Burrows harmless, and retaining the stock when all are paid.”

The evidence clearly shows that Junghaus and Fallon had full and accurate knowledge of the nature of the transaction; in fact, the resolution was carried by their votes, and they were chargeable with knowledge of the nature of the transaction, whether they actually knew its scope or not. At this time the assets of the company exceeded the liabilities, not counting the stock as a liability, by some \$17,000. The capital stock of the company was \$55,000, and according to the books of the company, the value of the stock was about thirty cents on the dollar, although if forced to realize, it probably would have been insolvent. At this time neither Junghaus or Fallon was indebted to the company, and they were solvent.

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Merchants' National Bank v. Overman Carriage Co.

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It seems hardly to admit of any question but what the sale of this stock by Junghaus and Fallon was a sale by them to the company itself. The purchase by Burrows, as trustee for the company, and its transfer to him as such does not change the real motive of the transaction. It was nothing more nor less than a sale to the company of its own stock.

That a company can not deal in its own stock is a well settled principle of the law that needs no citation of authorities. There are exceptions to this rule in cases only where the company may buy in its stock for the purpose of saving it from loss and for its own protection.

The resolution under which this purchase was made recites that it was for the purpose of the retirement of Fallon as vice president and Junghaus as secretary of the company. This is no valid reason for the company buying in its own stock. It may or may not have been for the interest of the company for these parties to retire from their offices, but it is not sufficient in law for the company to become purchasers of its stock. The necessity for avoiding loss to the company did not exist.

There is nothing in the case of *Morgan v. Lewis*, 46 Ohio St., 1, relied on by Junghaus and Fallon as authorizing this transaction, which holds that a corporation can buy in its own stock, except from necessity to avoid loss to the corporation. The reason for the holding there made, is found in the language of the court on page 7, where it is said:

"This proof would have established something beyond the mere good faith of the transaction."

Of course, if there was bad faith in procuring the stock of the corporation, it was the duty and the right of the corporation to undo the fraud.

But there was no element of fraud in procuring the stock of Junghaus and Fallon by them. They were the owners

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Guthrie & Sons v. The Angosta Milling Co. et al.

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of the stock in good faith and for value and in the regular way, and the company did not have the power to purchase their stock. The transaction not being lawful, it was void, and said parties did not cease to be stockholders in said company, and must therefore still be stockholders.

A decree should be entered in accordance with this finding.

*Marsh & Ritchie*, for Plaintiff.

*Follett & Kelley*, contra.

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(Third Circuit—Marion Co., O., Circuit Court—Jan. Term, 1899.)

Before Price, C.J., Day and Douglass, JJ.

(Judge Douglass of 5th Circuit sitting in place of Judge Norris.)

JOHN D. GUTHRIE & SONS v. THE ANGOSTA MILLING  
CO et al.

and

JOHN P. UNCAPHER against Same Defendants.

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*Referee—Exceptions to findings of fact—Review—Motion for new trial necessary—*

Where, under sec. 5210, Revised Statutes, the court appoints a referee to hear and determine all the issues of fact and law in a case, and to report his findings of fact and conclusions of law separately, a party desiring to review in the higher court the findings of fact on the weight of the evidence, should ask the referee for a new trial by motion containing the proper ground for that purpose, and if it be overruled, except thereto; and further, that to obtain such review, as well as a review of any other errors committed on the trial, a bill of exceptions must be tendered to and signed by the referee.

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Error to the Court of Common Pleas of Marion county.

PRICE, C. J.

These cases were heard and submitted together, and what we may say will apply to both.

The plaintiffs in error ask a reversal of the judgment of the lower court, wherein they were assessed as stockhold-

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ers in the Angosta Milling Company—an insolvent corporation, and the suit in which the assessments were made, was brought by creditors of the corporation, in which its stockholders and many creditors were made defendants. The creditors by answers and cross-petitions set up their respective claims, and some of these claims were contested on proper pleadings for that purpose.

Two of the defendants sued as stockholders—Mrs. Fisher and Mr. Ackerman—answered that they were not in fact or in law, stockholders, because, while stock appeared in their names by transfer from other stockholders, the transfer was brought about by fraudulent representations and deceit, for which they had rescinded the contract for the stock, and they asked to be relieved of liability, and that the same be placed on the parties from whom the stock had been thus obtained, who were its real owners. There were other questions made, which are usually incident to such proceedings.

The court or referee overruled demurrers to the cross-petitions of Mrs. Fisher and Ackerman, and this ruling is assigned for error.

During a term of the lower court, Rolla C. Perry was appointed referee in the case to hear and determine all the issues of fact and law in the case, and report the findings of fact and conclusions of law separately.

After partly hearing the case, Mr. Perry died, and W. Z. Davis was appointed his successor in the reference, and he took up the work under the scope of the order of reference formerly made, and after completing the trial and his investigations, he filed his report on the 19th day of May, 19, 1898.

On the 27th day of May, the court of common pleas rendered judgment against the stockholders, including plaintiffs in error, whom the referee had held to be liable, and for the amounts for which he had assessed them.

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The plaintiffs in error have filed with their petitions in error, a voluminous bill of exceptions, purporting to contain the evidence heard by the referee, and many errors are assigned as having been committed by the referee during the trial; and it is further alleged that his findings are not supported by the evidence, and are contrary to law.

All the errors complained of, except the rulings on the demurrers, can appear only by a proper bill of exceptions bringing them into the record, and we are required to first pass on the motion of defendants in error to strike the bill of exceptions from the files, because it was not allowed and signed by the referee.

We find that the bill of exceptions was not allowed and signed by the referee, but was allowed and signed by Allen Smalley, judge of the court of common pleas, and within the statutory time for that purpose.

Another point made by defendants in error, in the same connection, is, that we cannot review the findings of the referee on the weight of the evidence, because there was no motion for new trial filed with him at any time; and we find that no motion for new trial was filed with the referee and of course, he was not called upon to pass on such a motion.

It appears in the record, that the report of the referee was filed on the 19th day of May, as before stated, and that on the 21st of May, the plaintiffs in error filed in the court of common pleas their motions for new trial, and that they were overruled by the court.

Has the law been complied with in regard to the allowance and signing of the bill of exceptions? And was the court of common pleas the proper tribunal to hear and decide the motions for new trial? These are important questions of practice about which there is some controversy and confusion in our circuit, and perhaps elsewhere, and they involve a construction of those sections of the statutes which define the powers and duties of a referee.

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It is provided by section 5210, Revised Statutes, that—

“All or any of the issues in the action or proceeding, whether of fact, or law, or both, may be referred by the court, or a judge thereof in vacation, upon the written consent of the parties, or upon their oral consent in court entered upon the journal.”

Section 5211, provides in substance:

“That where the parties do not consent, the court or a judge thereof in vacation, may upon the application of a party, or of its or his motion, direct a reference in any case in which the parties are not entitled to a trial by jury.”

Section 5213, gives the method of procedure before the referee.

“The trial by referees shall be conducted in the same manner as a trial by the court; referees may summon and enforce the attendance of witnesses, administer all necessary oaths in the trial of the case, and grant adjournments, the same as the court; they must state the facts found, and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed, in like manner; their report on the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; when the reference is to report the facts, the report shall have the effect of a special verdict; and when the court directs it to be done, the referee shall reduce the testimony of the witnesses to writing and require them severally to subscribe the same.”

By virtue of this section, when all the issues of fact and law in a case are sent to a referee, as in this case, for the purposes of the trial, he stands in place of the court, and while it is in progress, may exercise all the powers of a court, and they continue until he has fully and finally disposed of the case and made his report, at which time they cease. He may allow pleadings to be amended—new parties to be made—rule on the admissibility of testimony—enforce order and the attendance of witnesses, and when the case is submitted, he makes the findings of fact and law.

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If a party is dissatisfied with the findings and desires a new trial, he should file his motion for new trial with the referee and have his decision upon it, and except to the decision if adverse to him, which is the foundation necessary to be laid for a review of a case on the facts in the circuit court. It is just as necessary that such motion be filed with and passed upon by the referee, as it is necessary that one be filed in the court of common pleas in order to review a finding of the court or a verdict of the jury on the facts in that court; and we think it is not sufficient to wait until the report of the referee is filed and then file the motion for new trial in the court where he was appointed, as was done in the case at bar. Section 5213 makes it the duty of the referee to "state the facts found and the conclusions of law separately, and their (referees') decision must be given, and may be excepted to and reviewed in like manner"—that is, in like manner as the findings and decisions of the court may be excepted to and reviewed—"and their report on the whole issue shall stand as the decision of the court. \* \* \*."

If it is thought that the referee is in error as to his finding of facts, he should first be given an opportunity to correct the error on a motion for new trial filed for that purpose, and the reasoning of Judge Ranney as to the fairness of the rule, as found in *Ide v. Churchill*, 14 Ohio St., 377-8—should apply to a referee as well as to the court.

Why file a motion for new trial as to the weight of the evidence, in the court of common pleas? That court did not hear the evidence or see the witnesses, and would lack some of the best means to test and judge of the credibility of witnesses. Moreover, unless the court directed the referee to reduce the testimony of the witnesses to writing and have the same signed, he is not required to do so, and he reports only his findings of fact and conclusions of law. How then could the court pass on a motion for new trial because



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the findings of the referee are not supported by the evidence? If the answer is, that the unsuccessful party could have all the evidence embodied in a bill of exceptions and thus brought to the attention of the court, we observe that the referee, and not the court, would know whether or not all the evidence was in the bill, and he should, for reasons just as strong entertain and pass upon the motion for new trial. Not until the motion for new trial has been disposed of, is it known that a bill of exceptions is needed. Then the provision made by section 5216, Revised Statutes, applies:

“The referees shall sign any true exceptions taken to an order or decision by them made in the case, and return the same with their report to the court, which made the reference.”

In our judgment, the referee has not performed his whole duty, until he has so far disposed of all questions that could properly arise in the case, that it is ready for final judgment when his report is filed. If he is competent to try the cause, he is competent to hear and decide a motion for new trial and sign a bill of exceptions. The law does not contemplate that after all the issues of fact and law are referred, that the referee hear and determine a part and the court another part of the case. This view is recognized in at least three cases decided by our supreme court.

In the case of *Lawson v. Bissell*, 7 Ohio St., 129, the court says:

“Instead of submitting a case to a jury or court, the code provides for a third mode of deciding issues of fact and law, and this is by referees. The referees are substituted for the court and jury, and their province is to decide the facts of the case, if the facts only are submitted, or both the facts and the law of the case, if both are referred. The trial before referees is conducted in the same manner as a trial by the court on submission. \* \* \* All such exceptions as could be made in the progress of a trial before the court,

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may be taken by either party in the trial before referees, and it is only in case an exception is taken, that so much of the testimony as may be necessary to give point and effect to the exception, must be embodied in the bill of exceptions. When the reference is to report facts only, the report has the effect of a special verdict; if the reference is of the facts and law, the facts and the conclusions of law are stated separately, and the report stands as the decision of the court, and judgment may be entered thereon as if the action had been tried by the court. The decision of the referee, however, may be reviewed by the court.

“These provisions of the code show clearly, that while the trial by referees is subject to review and revision of the court ordering the reference, it is a substitute for a trial in court. The finding of the facts is, in effect, the special verdict of a jury. The conclusions of law of the referees stand as the law decision of the court; and if not set aside, a judgment follows of course. \* \* \*.”

In the case of *Averill Coal & Oil Co. v. Verner*, 22 Ohio St., 372, the supreme court, again had occasion to speak on this subject, and the point is stated by Judge McIlvaine, on page 380. The referee appointed by the lower court had filed his report, and counsel for the defendant asked the court to re-commit the report, so as to enable defendant to except to the findings of fact, and tender a bill of exceptions to the referee for his allowance. The court, on page 380, in part says:

“The ground upon which this motion was urged was that the defendant had no knowledge of the findings in the report until after it was filed, and had no opportunity of taking exceptions. On the hearing of the motion, testimony was heard, and a bill of exceptions taken setting it out. From the testimony it appears that defendant's counsel stated professionally, that he did not see the report until after it was filed, and had no opportunity before the filing to move the referee for a new trial, or to set out the whole of the testimony in a bill of exceptions. The referee, however, testified that in the morning of the day the report was filed, he informed defendant's counsel that the report was

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ready to be filed. That counsel expressed a wish that he would retain the report three or four days, until certain parties could be consulted, but was told by the referee that if plaintiff desired it, the report would be filed at once.

“An opportunity should certainly be afforded to the parties by the referee, before filing his report, to examine it, and to tender, if desired, a bill of exceptions for his allowance, so that such facts as might be necessary to protect them against the consequences of errors, committed on the trial, may be placed on the record. But we cannot say that the court erred in finding from the testimony, that such opportunity had been afforded in this case. \* \* \*.”

If our position is not sound, a much shorter answer could have been made by the supreme court in the above case, by simply stating, it was not error to refuse to re-commit the report to the referee, so a motion for new trial could be filed and bill of exception allowed by him, because, he had no authority to hear a motion for new trial and sign a bill of exceptions.

Again, in *Cincinnati v. Cameron*, 33 Ohio St., 336, we find the following rule stated in the third syllabus:

“In a trial before a referee, the referee acts as a court, and exceptions to his action should be taken in the same manner as if the trial were proceeding in court. \* \* \*.”

We now cite two cases decided by the superior court of Cincinnati at general term, which have not been reversed or modified, and while they are not binding authority on us, they are at least very persuasive when we consider the names of the eminent judges who decided them.

In the *Wesleyan Cemetery v. Woodruff*, 2 Disney, 216, (3 W. Law Gaz. 251,) that court holds:

“Referees, under the code, possess judicial functions, and with the exception of the power to render judgment and issue execution, they possess all the authority of the court which appoints them. \* \* \*.”

The superior court was then composed of Judges Gholson, Spencer and Storer.

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The other case is *Williams v. Stevens*, 1 S. C. R. of Cincinnati, 176, wherein the court at general term, approving *Wesleyan Cemetery v. Woodruff*, supra, on page 178, says.

"As to the effect of the findings of referees, we cannot doubt the correctness of the opinion of this court in the case of the *Wesleyan Cemetery v. Woodruff*, 2 Disney, 216, announced by Judge Storer, 'that referees, when appointed under the code, possess judicial functions; that the authority conferred is to hear and determine the cause; that with the exception of the power to render judgment and issue execution, it would seem the referees possessed all the authority of the court who appointed them. to hear and decide upon the matters submitted.' And the supreme court in *Lawson v. Bissell*, 7 Ohio St. Reports, 132, hold to the same construction of the functions of a referee under the code."

The court then proceeds to distinguish between the reports of referees and masters, both as to procedure and the effect of such reports.

The latter case was decided by Judges Storer, Taft and Hagans.

We therefore conclude, that where a party desires to review the findings of a referee on the weight of the evidence, it is necessary to file a motion for new trial with such referee and that an exception be noted to the overruling of the same, and that any bill of exceptions taken must be tendered to and signed by the referee.

This rule was not followed in this case, and we sustain the motion to strike the bill of exceptions from the files. The only questions remaining in the record for our consideration, are the rulings on the demurrers to the answers and cross-petitions of Mrs. Fisher and Mr. Ackerman, and perhaps one other. We are content with the decision of the lower court upon them, and affirm its judgment.

Judgment affirmed.

*F. E. Guthrie*, for Plaintiff in Error.

*Schofield, Durfee & Schofield; Crissinger & Fisher*, for Defendant in Error.

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The City of Toledo v. The L. S. & M. S. Ry. Co.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before Bentley, Haynes and Scribner, JJ.

THE CITY OF TOLEDO v. THE L. S. & M. S. RY. CO.

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*Railroad Bridge at crossing of unimproved street—Duty to maintain bridge—*

(1). It is not necessary that a street should be placed in prime condition for public travel in order to lay upon a railroad company passing over it the obligation to maintain a bridge over it.

*Same—Doubt as to existence of street at time of locating railroad—Forty years' acquiescence—Effect—*

(2). In an action to compel a R. R. Co. to maintain a sufficient bridge where its track passes over a public street, the R. R. Co. denied its liability to construct and maintain such a bridge, on the ground that when its right of way was located there, there was no public street at that point; that such street was opened there after the location of the railroad, and that the erection of the bridge there forty years ago, was merely an act of complaisance on its part towards the public; held, that although the evidence whether there was a public street at this point at the time the railroad and bridge there was constructed was doubtful, yet from the fact of the continuation of this condition and the acquiescence of all the parties therein for forty years, the court holds the R. R. Co. liable to maintain the bridge at that point.

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Appeal from the Court of Common Pleas of Lucas county.  
BENTLEY, J.

The questions in this case are worthy of more elaborate treatment than we shall be able to give them in announcing our opinion.

In April, 1853, the Northern Indiana Railroad Co., the predecessor of the defendant, The Lake Shore and Michigan Southern Railway Co., began proceedings in the probate court of this county for the appropriation of a strip of land on the northerly side of subdivision 2 of river tract No. 5 in this city, for a right of way for its contemplated railroad, said strip being about 150 feet in width. On June 10, 1853, such appropriation was completed by the payment of the amount of the award in the probate court. Some

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The City of Toledo v. The L. S. & M. S. Ry. Co.

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two years later said railroad company caused the grading necessary for its roadbed, through said strip lengthwise, to be done, and in so doing made a cut at the point where Broadway crosses said right of way at the present time, to the depth of about twenty feet. Over this cut, and at that point, the company then, at an expense to itself of \$1,800, constructed a substantial bridge "to accommodate the public travel," as it says in its answer in this case; and it and its successors in the title and use of said railroad, including the defendant, have, at their own expense, maintained a bridge there ever since, which has been used constantly by the public ever since Broadway has been a public street until a time not long prior to the commencement of this action, when the bridge at that place had become insufficient for the needs of the city, and unsafe and dangerous to those who might have occasion to pass there, and especially unsafe for the passage of street cars which the city had authorized to run across there. Thereupon the city having condemned the bridge as unsafe, notified the defendant it was required to build a new bridge at that point sufficient for the accommodation of the public travel along Broadway, which was largely increased, and the street tracks, bearing heavy electric motor cars having been laid thereon since the present bridge was built. The company refusing to construct such new bridge, the city began this action for a mandatory injunction to compel the defendant to construct it. The railway company admits that a new bridge over its track at Broadway is needed, and that it is competent for the court to grant the relief prayed for if the company is under obligation to maintain any bridge there; but it denies that it is so obliged, for the reason that while it is admitted that Broadway was at the commencement of the action, and is now, a public street of the city, it was not such street when the predecessor of said defendant appropriated said right of way, nor when it constructed its grade, and it is

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claimed that in constructing said original bridge, and in maintaining and renewing it from time to time, the Northern Indiana Railroad Company, and afterwards the defendant, each acted under some misapprehension of its rights and duties, or that each acted in that regard simply by reason of the complaisance of certain officers or agents, or their desire to manifest their general good will, and that there was, in fact and in law, no such obligation upon the railroad companies; that this construction and maintenance of a bridge in no wise interferes with the right of the defendant, nor to maintain its denial that there was any original liability of the Northern Indiana Railroad Company to construct any bridge there, or any liability for it or the defendant at any time since to maintain one there. On the other hand, the city claims that there was a valid and existing street there at the time that the appropriation proceedings were begun and were concluded, and when the track was graded.

The testimony which was produced before us brings up many interesting facts in the history of the city, and enables us, almost judicially, to refute the ancient slander that the Maumee country was unhealthy; because a large company of hale and hearty persons appeared before us as witnesses, who had enjoyed the felicity of a residence in this salubrious region, some of them for ten, others for fifty and sixty and even seventy years, and their appearance would indicate that the conditions there were favorable to longevity, at least.

The testimony bore more particularly upon the situation of Broadway in the old days, before this appropriation of 1853, and during that year and during the years since.

There is a statute bearing upon this matter, found in section 3284, Revised Statutes, which reads as follows:

“A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water,

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divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness; and any or all railroads hereafter constructed, which shall cross any avenue or public highway leading from a city of the first or second class, to a public cemetery of such city, situate within or without the limits of any such city, shall be constructed so as either to pass under or over such avenue or public highway, at such elevation or depression as the case may be, as will allow the unobstructed passage of all wagons, carriages, or other vehicles which it may be necessary for any person to use upon such avenue or public highway."

And it is claimed that by reason of this statute, a statutory liability was incurred by the predecessor of the defendant to build this bridge, and by itself and its successors to maintain it. It is also claimed that, independent of a statute, if there was a public highway across the right of way of a railroad company at the time it acquired such right of way and constructed its road, there was a common law obligation resting upon the railroad company, in reason and in fairness, to make it possible at that point to safely cross its railway, and to erect and maintain such structures as would be reasonably necessary for the public highway at that place.

As is well understood, the principal controversy in this case is as to whether Broadway was, in legal acceptation, a road or street of the city, at the time of this appropriation; or, as another phase of the question might put it, at the time that the grade of this railroad was constructed at that point; and to this question mainly the testimony of witnesses and the evidence introduced were addressed. It was claimed upon the part of the city that before the acquisition of any right by the original railroad company at this point, there was a legal and valid establishment of Broadway at that point, and it is also urged on behalf of



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the city, that whether that is true or not—that is, whether the road had been established according to the forms of any statute bearing upon it—there was in fact a public highway there, recognized and used by the public, and an obligation upon the city to keep it in repair as a street of the city; and if this road was not laid out and established by the ordinary processes under the statutes, it had become so by a common law dedication upon the part of the owners of the lands and an acceptance of the dedication by the public authorities. The contention of the city is, that in either view of the case, the obligation of the railroad company to construct and maintain the bridge was equally binding.

It is common learning, that in order to establish a public highway without the ordinary forms prescribed by the statutes, the owners must be willing to dedicate the land for the purpose, and they must in fact dedicate it, and in addition to that, the public-authorities must accept the dedication. If either of these things is wanting, there is in law no public highway at the point. This being the law, it became and was proper to receive any testimony or evidence which would bear upon either of these phases of the question—that is, which would tend to show a dedication upon the part of the owners, or its actual acceptance by the city and public authorities, or the public.

During the introduction of the evidence in the case, various objections were made by the defendant's counsel to the introduction of evidence as to certain things done by the city council by way of approving of certain maps which had been made, which exhibit Broadway as extending over this point in question before 1853; the ordinance of February 21, 1852, and the reports of the assessors in this case; the ordinance or resolution by the council approving the Hart map—so-called; the ordinance of September 15, 1853, establishing the grade of Broadway; the ordinance of December 9, 1853, under which a contract was made with one

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Conolly for grading Broadway; and various other items which were claimed by the railroad company to be inadmissible as evidence, on the ground that even if said proceedings were had, they did not accomplish the purpose which the city claims was in fact accomplished. All this evidence, and I will not go over it further in detail, was received temporarily by the court, with an intimation that it might be hereafter ruled out upon application by the attorneys of the railroad company, if, upon further investigation, we should conclude that it was inadmissible. In considering the case, and in view of our understanding of the law regarding the facts that may bear upon the question of dedication, we think that all of the testimony, each item of evidence thus received, should be considered by the court; and the motion to exclude it will be overruled, and it will be considered for such purposes for which, as we think, it is properly receivable.

There was a great deal of testimony given through the course of the trial as to there being what was called in those days the "River Road" between Toledo and Maumee. Upon the one hand, the city sought to show that this road, however called, was a road that since a time long prior to April, 1853, followed substantially the course that Broadway now takes, and especially at the point where Broadway now crosses this railroad. On the other hand, it was contended by the defendant that the river road was wholly northerly from that point, and surveys of that road made at various times, were introduced, and testimony was addressed to the point as to where, in fact, such a road was used. Now, upon this question of fact, so far as it may be necessary for us to announce any opinion regarding it, we conclude from all the light that we have been able to focus upon it, that the river road, as legally laid out and established, was not at the point in question over what is now the line of Broadway, but was northerly of Broadway, and

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that as a general thing the travel along what was called the "River Road" went northerly from the place in question. There is, however, testimony tending to show that there was a public travel over the line of what is now Broadway at this point, and that whether it followed the legally established River Road or not, it was the customary way for the public to travel, for a great many years, and that in fact there was a public road there, which, under the charter of the city and the laws applicable to the case, became one of the public streets of the city, however named, or whether having any name or not. As I say, there was some testimony tending to show that. Some of the witnesses stated their recollection that that was the case. We are inclined to think that there was quite an amount of travel from time to time over what is now called Broadway, perhaps this side of the ravine which was largely spoken of by the witnesses, and this side of the railroad crossing, and perhaps again on the other side. We would be unable to conclude, however, that this travel was sufficient to establish, by a mere user, a road there; the length of time and character of travel would not warrant such a conclusion; and neither is there sufficient testimony that the road was so used at this point, so uniformly and long, with the knowledge of the proprietors of the land, that any common law dedication might be presumed or found to have been made by the owners. If there was a street there, we think it must be gathered from other considerations than the mere fact that the public had travelled over there a long while and had established it by user. Better than the recollection of witnesses as to roads among the trees and through the woods, many years ago, having more probative force, we think are the records that were made at the time by skilled persons actually measuring the point in question and surveying it, and noting their observations at the time, when there is no chance that there was any idea of controversy, present or future over the

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facts they thus state. And we are inclined to think that the road which was followed by the travel in general, at this point deflected to the north, and went around the head of this ravine, rather than right through it at this point. We gather this not only from the testimony of the witnesses as to the actual use of the road there, but from the evidence showing the situation and character of the land at this point in question.

There is other evidence bearing upon the main issue here which we will now proceed to consider. I may not state it in its proper order, but will endeavor to follow the line of the main features, so that it may be seen upon what basis we have placed the conclusion at which we have finally arrived. As I said, we think it is proper to consider all of the facts and circumstances bearing upon the situation here about 1852, or shortly before that, and at some time after that, the acts of the parties owning this land, and the action of the public authorities regarding this street. I will recite now some of these things that might be considered as bearing upon one or the other of these points.

In 1847, there was a plat of the streets and alleys dedicated to public use, upon which was shown this end of Broadway as dedicated to the public as far as Newton street, and not further. On September 4, 1851, there was quite a large number, or several persons, who owned what was called "River Tract No. 5." The railroad strip of land was taken off of the northerly side of River Tract No. 5, or a portion of it. September 4, 1851, there was a suit begun in the court of common pleas of the county between all of the owners of this tract and some other tract, in order to obtain a partition of the lands between the several owners. Commissioners were appointed in the course of that proceeding under the statute, and finally they made a report on February 23, 1852, in which they partitioned the land. A plat accompanied their report, and was made a part of it,

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which was a map of the lands in question. Their report was written upon this map, and in order to understand that report, or to determine what tracts were set off to each of the owners, a resort must be had to the plat. They set off to one of the owners a tract which they designated as subdivision 2 of this river tract No. 5, the sides of which came up to the north line of river tract 5. This subdivision 2 was set off to one of the parties to the action, named Neiswanger. This map exhibits a prolongation of Broadway from Newton street in the direction of Broadway that had already been dedicated, through the entire tract of land, as far as the city limits, now South street. The plat or map showed this street, and upon it was written "Broadway," but there were no words in the report which said that that was a street which the commissioners had laid out or dedicated, but it simply exhibited a street there and called it "Broadway." Upon this street, however, some of these subdivisions were bounded. Subdivision 2, of which I have spoken, extended both sides of this projected street, but other subdivisions were bounded upon the center of this street. This report and return of the commissioners was confirmed by the court, and apparently the parties acquiesced in the partition. I will repeat that the report was made and confirmed February 23, 1852. On February 21, 1852, the council passed an ordinance extending Broadway along the very line that two days afterwards appeared in the report of these commissioners, and providing that the land be condemned for the purposes of a public street there, and appointing commissioners to assess the damages to the owners. It seems that the commissioners who were appointed were O. C. Helsey, C. D. Woodruff and P. H. Shaw. On February 23, 1852, they made a report stating that they had viewed this line of Broadway to estimate the damages and found that no damages would be suffered by

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the owners. That seems to be the last of that proceeding, so far as it is exhibited in the public records of the council. On March 6, 1852, the map which is called the Hart map—showing Broadway established as indicated in this partition plat, and as also indicated in the ordinance of the council just alluded to, was by ordinance approved by the council. On April 23, 1853, Northern Indiana Railroad Company filed its petition to appropriate this land for railroad purposes. On May 23 and 25, 1853, there was a verdict of the jury awarding damages, and June 10, 1853, the company paid the money awarded into the probate court (the probate court having confirmed the verdict, it seems, May 25, 1853, and at the same time that it was returned). September 15, 1853, an ordinance was passed by the council which established the grade of Broadway along this line clear through to South street—the city limits. On December 9, 1853, an ordinance was passed for the actual grading of Broadway along this line, and under this ordinance, not long afterwards, a contract was awarded to one Conolly to do the grading. In the line of evidence and testimony there comes next in chronological order the testimony of Mr. Marston, small portions of which I will read. We regard his testimony as important. He was a surveyor, a civil engineer, and he came here December 4, 1853, and says he was in the service of the city engineering department, and thereupon this question was asked him:

“Q. You may go on and state what the work was, or service, where it was performed, and what it was about? A. Well, the first that we went on to Broadway was May 22d. We run levels over Broadway in 1854.

“Q. Whereabouts did you begin? A. I don't remember where, but I think we—my recollection is that we run the entire length of it.

“The Court: Q. You commenced that day, and ran the lines where? A. I am not positive—

“Mr. Potter: Q. What was the day? A. May 22d.

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"Q. Under what contract for improvement was that—in what contract? A. I don't think it was under any contract. I think it was merely for the purpose of making a profile, or something of that kind.

And he worked only that day at that time.

"Q. And where did you start from and where did you go to? A. As I said before—I wouldn't say positive, because we only ran levels over Broadway. I should think by that, that we went over the entire length of it—because the next time we were there I put down that we ran the levels over a part of Broadway, and if we hadn't gone over the whole of it at that time, I should have probably have noted then that it was only a part."

Lower down he says, in answer to this question:

"Q. At that time, what was the condition of things up there so far as Broadway was concerned—what condition was that locality in or the road in? What did you find? A. I won't say positively, but I don't think there had been anything of any grade made then; I think as far as around the railroad—all beyond the railroad—there had been no grade of any consequence at all; my recollection is that there was not any. As near as I remember it, we ran that profile as a sort of a test of the levels of some previous levels which had been taken before."

Then he speaks of the condition in which he found the ravine, and further over is the further question:

"Q. What was the condition of Broadway as to being opened up when you went there to run these levels the first time? A. I can't say anything more about that first time that I was there I have said. The next time I was there was September 20, 1854. I don't know any reason why we didn't go up there any oftener except that it was the year of the cholera and there was not much work done. There was not any engineering work done there during that interval, because if there was any done, why, I went. Then I ran levels over a part of Broadway; and at that time the grade had been commenced on both sides of the ravine and the ravine partly filled up, and the road had been cut out beyond the railroad—I don't remember how far, but at least beyond Western avenue—cut out its entire width at

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least beyond Western avenue, and it was partly graded down on both sides of the ravine, and the ravine partly filled up, September 20th. At that time the street was under contract with Conolly."

Then Mr. Marston proceeds to state regarding the river road and some surveys regarding that.

The contract being made with Mr. Conolly at some time previous to the time that Mr. Marston speaks of here, the grading was completed in 1855, and on November 13, 1855, an assessment to pay him was confirmed by the council. Some time after this, the railroad company being assessed to pay a portion of this grading which had been done under Mr. Conolly, refused to pay it. Suit was brought by Mr. Conolly against the railroad company to compel its payment, and this finally went to the supreme court, the case being reported as Railroad Co. v. Conolly, 10 Ohio St., 159, and the railroad company was compelled to pay this assessment. When the railroad company came to make its grade, which was perhaps in 1855 and 1856, it cut down the grade at this point of extended Broadway about twenty feet, and, as I have already recited, it constructed at an expense of some \$1,800 this bridge, it says to accommodate the public travel. It and its successors are to maintain that bridge, or a bridge, at that point, until the present time, and from that time on the public have had possession of Broadway, and travelled it constantly, and the city authorities have treated it as a public street. Everybody seems to have acquiesced as if that ordinance was valid.

On the other hand, the claim by the railroad company is, that there was no street there at the time that it acquired its right of way, viz.: in 1852 and 1853—in the summer of 1853. It says that the ordinance passed by the council in 1852, seeking to condemn that property for street purposes, was utterly void and of no effect, because, while that pro-



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ceeding might have been in conformity to the original charter of the city which had been granted years before, yet in the meantime the new constitution of 1851 had been adopted, and there was no provision made, as required by the new constitution, for the assessment of damages to the property owners by a jury where property was condemned for public purposes, and that as certain sections of the constitution required that, an attempted condemnation under the old form of proceeding was void by the very force of the new constitution. As a strict matter of law, we suppose that that was true; we suppose that the ordinance thus passed by the council did not effect the legal condemnation of that property, did not estop nor prevent the owners from asserting ownership over it, if they had seen fit; but it will be remembered that the new constitution had gone into effect but a short time before that, and there was yet no decision of the supreme court construing these new provisions or defining what their effect would be upon such proceedings taken under old charters or old laws. The court afterwards did pronounce upon that subject, in a case reported in the 2 Ohio St., I believe. But it would seem that no party connected with the transaction here in view, regarded the effect of the provisions of the new constitution. The attorney who represented the railroad company in defending against that assessment suit of Conolly to enforce that assessment (being Honorable Morrison R. Waite) did not urge this point, but seemed to rely upon the claim that as the railroad company simply had an easement or right of way for public and railroad purposes, it was not the owner of lands in such a sense on either side of Broadway as would warrant an assessment against it as the owner of land. The council, after the passage of this ordinance, passed other ordinances, on several occasions, regarding and fixing the grade of the street. They sent their engineers upon it to make surveys; they surveyed the road; they

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levelled it, and corrected those levels on other occasions, and awarded this contract to Conolly. And it seems from the testimony fairly considered, that prior to the time that the railroad company had acquired its rights under these condemnation proceedings, for some purpose or other, and by some person or other, the street, as extended upon these maps and plate, had been cut out. Mr. Marston went there September 20, 1854. At that time the street had been cut out to its full width, and he noticed particularly that the trees on either side were so tall that they met in the center, thereby embowering the road. And that in connection with the testimony of the witnesses—quite a number of them—who resided in the vicinity at that time, some of whom owned property in the vicinity, to the effect that the road had been cut and the trees had been sufficiently cut out that wagons could go along there, and some testimony—quite an amount of it we might say—that wagons went over some portion of this extended Broadway, and were accustomed to pass along there before that time, and the fact that no owner of land interfered in any way, and the action of the railroad company in 1853 regarding the bridge and regarding the grade, and all of the circumstances surrounding the situation at that time, lead us to conclude that every person concerned—attorneys, the council, officers, owners of land and everybody—supposed that Broadway had been legally acquired by the public as a roadway. And the railroad company, acting upon that supposition, went to this expense of some \$1,800, to make that bridge. It is noticeable also that when the railroad company began these condemnation proceedings it described the tract of land that it wanted to appropriate as a strip off of the northerly side of this subdivision 2. This subdivision 2 was not known in the records other than as it was shown upon these proceedings in partition and the record of that plat, which was afterwards placed among the city records. The railroad

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company therefore seemed to be cognizant of these partition proceedings and what had been done regarding them when it entered upon its appropriation proceedings. So far as it is made to appear from the testimony, all the proprietors acquiesced in these proceedings dealt with the property and acted exactly as they would if this Broadway had been actually laid out.

It is claimed upon the part of the railroad company, that the intention of the owners to dedicate this street is not sufficiently evinced by this plat. Counsel sought to distinguish this case from one reported in 19 Ohio St., because in the latter case the report of the commissioners in partition had said in so many words that the streets and alleys designated on that plat which they returned were "hereby forever dedicated to public purposes," or words to that effect; but that in the present case there were no such words of dedication, and nothing to indicate a dedication, except the showing of the projected street upon the map, and the name written or printed upon it. But we are unable to conclude that as far as the proprietors are concerned this makes really any substantial difference in the rules to be applied to the two cases. We are clearly of the opinion that those circumstances evince a willingness and an intention upon the part of the proprietors, so far as they were concerned, to dedicate such a street, substantially as laid down upon this partition plat. All the acts which had been done therefore, all the acts which accompanied this and followed it from that time, would seem to be in line with this idea; that they were willing that this piece of land should be thus used for a public street, and that they intended that it should be dedicated to the public for that purpose. We think the railroad company was fairly charged with notice of that fact, and notice and knowledge of these circumstances, and the intent of the proprietors.

Now, when it came to grade its road, all these matters

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were very fresh in the memory, and were open, many of them, to the sight; where the public had travelled; how far Broadway was cut out; how much it had been travelled; and everything, that bore upon the question would seem to have been then fairly before their eyes, to determine the question whether or not it was then and there a street or otherwise. Acting upon what we must suppose was fairly and fully known to it, it voluntarily built this bridge at this large expense. We are unable to think that it did it for the mere purpose of obtaining the approval of any private persons, or of evincing a general good will towards any person that might possibly want to stray along that way and go over that portion of the track. We are inclined to think that at that time, its officers and agents regarded it as a public street, acquiesced in it, found themselves, as they thought, in a situation where they would be required to expend a large sum of money to build and maintain a bridge.

This may bear not only upon other portions of the case, but upon that portion of the testimony which might be regarded as otherwise somewhat doubtful as to the real situation of the matter. At that time it would seem that the city, so far as it could or would naturally be expected to, had acted upon the supposition that, that was a public street, and so far as it was necessary for the city to accept any dedication that might have been made or acquiesced in by the proprietors of the ground, such acceptance had been shown by all of these acts.

We think it would not be necessary that a street should be placed in prime condition for public travel in order to lay upon a railroad company cutting through it the obligation to maintain a bridge over it. That it was not graded to any great extent at that time is quite probable. Some of the testimony indicates however, that the grading had been begun there; some of the testimony indicating possibly a purpose to begin a grade at that point, and to begin

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it there first to accomplish some public purpose, perhaps. However that may be, we find that very soon after the appropriation proceedings had been taken by the railroad company there was something of a grade established there. We think the testimony fairly warrants us in concluding that the street had been cut out before that time, and that to all intents and purposes it might have been regarded as a street, in possession of the public authorities at the time of the appropriation.

There is another question that we will allude to: In this case the arguments addressed to us were for the most part as to the situation of affairs at the time the appropriation proceedings by the railroad company were instituted and completed. We are not at all certain that that is the time which actually fixes the duty of the railroad company. It will be noticed that the statute says, a company, "whenever it is necessary in the construction of its road to cross a road," etc. The duty comes to the railroad company when it constructs its road across a road. Now, at that time the inquiry would at least be interesting as to whether, if there was a road at the time of the construction of the railroad, it makes a difference just what the situation was at the time that the railroad company first appropriated it as a right of way. Frequently it happens that a right of way is condemned by a railroad company years and years before a road is actually constructed upon it, or before any grading is done; and now, if during those intervening years it would be impossible for the public to cut a road for a public way over the projected right of way of a railroad company, and construct a road so that the railroad company would, under the law, be obliged to maintain a proper crossing over it, it might then be urged that the time of the beginning of the appropriation proceedings was the time to be considered. But is that true—can it be regarded as a fair statement of the law upon the question? For myself, it seems that the

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inquiry is very pertinent; what was the condition at the time of the construction of the railroad itself? If at that time there was, either by dedication, or by condemnation, or any other legal proceedings, in fact and in law, a public street over the railroad, it would seem to me to present a case where the railroad company would be obliged to keep up the bridge or crossing. If it had been condemned after proceedings by the railroad company, it is possible that the fact that it might thereafter, by constructing its line, be obliged thus to construct and maintain a bridge over that point, should be considered in determining the proper rule of damages to be applied in such a case.

Now, in addition to these considerations which lead us to the idea that the law would require the railroad company to construct a bridge at this point, it may be said that that is not just the question presented to this court at this time. It is not a question of the original construction of a bridge whether, after the railroad has in fact constructed a bridge at its own expense, maintained it, and acquiesced in the idea that its duty was to maintain it, for forty years; when the public authorities of the city have maintained the street with reference to that, have allowed, as we may say, the railroad company to maintain a bridge at the crossing, taking its chances as to its liability in case of accident on such bridge; have constructed and improved the street on both sides of this crossing for all these years with reference to this act of the company and its acquiescence in this situation of affairs; then the question whether such a bridge shall be maintained at that point where it has been maintained by the uninterrupted act of the company for forty years—whether that is the same question that would be presented if we could place ourselves back to 1854 or '5 in order to determine whether it should originally build a bridge or not, I think is somewhat doubtful. I think other considerations come in, or may come in, to determine

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the true view to take of such a case. I think to the ordinary apprehension it would appear to be the law that where the condition of things has remained and been acquiesced in by all parties for forty years, a very clear and definite and overpowering reason should be given why it should be broken up and changed at the instance of one of the parties involved.

Upon the whole case, and without attempting to go into it further, we are unanimously of the opinion that this railroad company is obliged to construct this bridge, or a sufficient bridge, according to the prayer of the petition; and that will be the order of the court. The costs will be adjudged against the defendant, the railroad company.

(Third Circuit—Allen Co., O., Circuit Court—Nov. Term, 1898.)

Before Day, Price and Norris, JJ.

WALTER ZINN, on behalf of himself and others, v. S. A. BAXTER et al.

*Fraudulent action of bank directors breaking bank—Right of one who lost his stock thereby to sue them.*

- (1). Z. was the owner of stock of a bank incorporated and organized under the laws of the United States. An assessment of the stock was made by order of the comptroller of the currency to make good the impairment of its capital. Z. not being able to meet the assessment, his stock was sold at assessment sale. The capital of the bank was dissipated by its officers and directors and through their negligence. Z. brings action against said officers and directors on behalf of himself and all the stockholders to recover for loss thus occasioned to the bank and its shareholders and creditors, and asks for judgment for himself and the other shareholders.

Held: that the cause of action was not in favor of Z., but was in favor of the bank; that the liability of the defendants was to the bank, and was an asset of the bank; and that the interest of Z. followed the stock so held by him, and when he ceased to be a stockholder, his right to bring and maintain the action terminated.

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Error to the Court of Common Pleas of Allen county.

NORRIS, J.

The plaintiff in error, Walter Zinn, who was the plaintiff below, sets forth the following facts in his petition, and upon these facts he rests his action against the defendants below, who are the defendants in error here.

He says that on and prior to January 1st, 1893, the First National Bank of Lima, Ohio, was and is organized and incorporated and doing business under the laws of the United States. That on and prior to the 1st day of January, 1893, he was the owner of 100 shares of the capital stock of said bank for which he paid the sum of thirteen thousand dollars (\$13,000), and that he continued to be the owner of said stock until some time in 1895, when his shares were sold for the non-payment of the assessment thereon. The capital stock of this bank was one hundred thousand dollars (\$100,000), and he gives the names of the directors and of the officers of said bank, who were duly elected and chosen and served as such during the years 1893 and 1894, and gives the periods between which each served; R. C. Eastman is made a party to the action by reason of having been made executor of the estate of J. M. Coe, deceased, who during a portion of the period named was one of the directors of said bank.

The plaintiff says, that the officers and directors of this bank knowingly permitted the total liabilities to said bank of a corporation known as the Monroe Manufacturing Company, of this city, for money borrowed, and including the liabilities of the individual members of the said Monroe Manufacturing Company, to exceed one-tenth part of the capital stock of said bank actually paid in; and that the comptroller of the currency found the capital impaired on and prior to the 1st of October, 1894, and ordered an assessment of one hundred per cent (100%) on its stock to be made, and such assessment was made.



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That the indebtedness of the Monroe Manufacturing Company, and its members, to said bank, which arose and accumulated from about the 1st of July, 1893, to the 1st of November, 1894, for money borrowed, amounts to a total of \$145,150.00, and all without security of any kind. The amount and date of each loan is set out in the petition, and he says that at the respective date of these loans the manufacturing company and the bank were both insolvent, and that the officers and directors of the bank knew it, or by inquiry which it was their duty to make, could have known of the insolvent condition of these institutions.

The plaintiff alleges the facts in his petition, which warrants the assertion therein made that this indebtedness of the Monroe Manufacturing Company and its members to said bank was contracted from time to time with the express or constructive knowledge and assent of these officers and directors of the bank, and that they knew that its money was thus being loaned without security of any kind to an insolvent concern.

That during all the time that this liability was accumulating the directors knowingly and carelessly suffered the president and cashier to manage the business affairs of the bank without any supervision or investigation, and that the making of these loans to said manufacturing company was the result of their negligence, incompetency and dishonesty.

That the cashier of the bank willfully concealed to the aggregate of over \$80,000 worthless drafts and notes of said manufacturing company, upon which the money had been advanced by the bank and which, when sent for collection, went to protest and were returned.

That for those years, '93 and '94, the directors knowingly and negligently failed to require the cashier to execute his bond as such cashier in accordance with the by-laws of said bank.

That the cashier unlawfully and falsely, and to conceal the

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liabilities of said bank, falsely marked certain valid and unpaid certificates of deposit as void or paid; and much else of like import is set out in the petition at length.

The plaintiff says that during this time he lived in Columbus and had no knowledge, either directly or indirectly, of these gross frauds and of this careless management, and of the enormous sums of money thus loaned, until on the 4th of October, 1894, he received notice from the president of the bank that an assessment had been made upon his stock, and that its payment was required.

And he says; that all of this impairment and misapplication of the capital stock of this bank and of its profits, and its consequent insolvency and collapse, and the requirement of its re-habilitation by the 100% assessment upon its capital stock, was occasioned by the negligence of the defendants, the officers and directors of said bank, and their mismanagement and violation of their duty and the law. And that by reason of these omissions and commissions of these defendants, the officers and directors of said bank, he lost his stock; he was not able to pay the assessment, and his stock was sold by order of the comptroller of the currency.

Plaintiff says that since that sale he has served notice at various times on the officers and directors of said bank requiring the payment of the value of his stock which he says was up to the time it was impaired by the acts recited, worth \$13,000, or that the directors of said bank cause action to be brought against the defendants, who had thus been delinquent, with a view that this sum be made good; but to all this no attention has been paid and no action has been taken.

The efforts of the plaintiff to thus induce proceedings against the defendants upon the part of said bank and its officers being futile, he says that he now brings and prosecutes this action on behalf of himself and all other stockholders who desire to become parties thereto. And he asks

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that an account be taken of the loss and damage to said bank and its shareholders and creditors, sustained by reason of this misconduct and mis-management of the defendants, and that he have a judgment for his thirteen thousand dollars against the defendants and each of them, and for a judgment for the other shareholders of the bank in such sums as the court may determine.

Tendering the facts in substance as I have recited them, and making parties to the action each officer and each director of the bank, whose service covered the years 1893 or 1894, or any part of those years, and making the bank itself also a party, the plaintiff seeks the relief prayed for in his petition.

To this petition each of the defendants filed a demurrer. The grounds of each demurrer are:

First: That plaintiff has not legal capacity to sue.

Second: That several causes of action against several defendants are improperly joined.

Third: That said petition does not state facts sufficient to constitute a cause of action.

The first and third grounds of these respective demurrers to the petition the court below sustained; neither party pleaded further, and the court entered judgment on the demurrer, dismissed the plaintiff's petition and adjudged the costs against him.

To this ruling and judgment of the court below the plaintiff prosecutes error in this court; and assigns as his reasons for reversal, that the common pleas erred in sustaining the first and third grounds of the defendants' demurrers, and in dismissing his petition and entering judgment against him.

There is little room for controversy as to what relationship exists between a shareholder in a corporation and a corporation in which he owns the stock, and between the officers and board of directors of the corporation who control its management and have custody of its property and

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assets, and their duties to the corporation and its shareholders.

The first purpose of its capital stock and the amount paid in by its shareholders, is to meet the liabilities of the corporation and to pay its debts, and beyond the face value of its stock, representing the amount paid in for this purpose assessments may be made upon the stock to an extent fixed by the law which creates the corporation, all to meet and discharge its liabilities. And this burden follows the stock wherever it may go, and postpones every other claim upon the assets of the corporation, and is paramount to every right which stock may avouch to one who owns it.

Its paid up capital is a fund which belongs not to the shareholders, but to the corporate body which the law has created, the corporate entity which the law has clothed with powers and defined them, and upon which the law has enjoined responsibilities and determined them.

The ownership of stock, says Judge Boynton, in the case of *Jones v. Davis*, 35 Ohio St., 477, "involves the right to participate in dividends declared from the profits of the business, and upon dissolution of the corporation to a proportionate share of the corporate funds remaining after payment of the debts of the corporation. The right of the shareholder does not enable him to withdraw any portion of the capital stock of the corporation from its control, nor to exercise any authority over it further than to participate to the extent of his stock in the election of a board of managers charged with the conduct of the business for which the corporation was created."

Between the shareholder and the directors subsists the relation of trustee and cestui que trust. It is the duty of the directors, says Judge Williams in case of *Rouse, Trustee, against The Bank*, in 46 Ohio St., 502, "to so administer the trust as to best promote the interests of the shareholders, to pay their appropriate dividends from time to time

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and upon the dissolution of the corporation to distribute to them their respective shares of the corporate property after the payment of its debts."

And we think these cases put the matter very plainly. A stockholder in a corporation does not stand to the corporation in the relation of a creditor. One of the objects of the creation of a corporation is to obtain credit; its very creation is of itself a pledge of its capital stock to its creditors. While its creditors may in equity follow the corporate property which has been deflected from the primary object of paying its debts, up to the threshold of a bona fide purchaser for value without notice, and enforce his lien upon it; a stockholder has no equity as an individual, but his rights as such stockholder must be worked out in the first instance through the corporation itself. Its rights are but incidentally his rights, such rights as are communicated by his relation to the corporation as an owner of its stock. And if this right—which is a mere incident of his stock—has been lost to him by the law; if his stock which carries with it its burdens as well as its benefits, has through legal channels passed out of his hands and his rights are thus by the law lost to him, equity can not restore them, and he becomes a mere stranger to the corporation and its burdens and its benefits. His relation to the corporation which existed only by virtue of his stock, has ceased and determined.

So in this case, the position of counsel that this plaintiff having once been a stockholder in this bank, and having parted with its stock through the agency of the law, still has rights which in equity can and should be saved to him in an action of the character at bar, is untenable.

There can be but little doubt that if this plaintiff, supplemental to the facts set up in his petition, had continued to the present time a stockholder in the defendant corporation, that the status for recovery would appear in this action. But his chiefest claim is that he ceased to be a stock-

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holder from the causes assigned in his pleading. That the necessity for an assessment of the capital stock existed; that this was determined and the assessment was ordered to be made and was made by lawful authority; that he was unable to meet the demand which his stock thus made upon him, and that by legal process, the stock was sold to meet this assessment and his stock was thus lost to him; all by the fault of the defendants, not in robbing him of his money, but in allowing the bank to be looted and its capital dissipated.

His story, which is admitted by the demurrers to be true, is to the effect and to no other, that these defendants are indebted to the bank because this condition of the bank arose through their fault and negligence, and with their knowledge and assent, and that they are liable to the bank, and incidentally through its directors, who are the trustees of its fund for the benefit of its stockholders, to those who own the shares of its stock. And that he is not one of those who own any of the shares of its stock.

Now, that is the case made in the petition. It is only for the benefit of the bank that the suit could be maintained, and the bank is the only beneficiary. It is only by the bank or upon the refusal of its officers, and upon it being made to appear that otherwise there would be a failure of justice, then by one or more of its stockholders, for its benefit, that the action can be maintained, for the reason that the cause of action belongs to the bank.

There is no doubt that by this petition the defendants are liable to the bank, and only to the bank. There can be no double liability, and if liable to the bank, they can not be liable to the plaintiff. This claim against the defendants is an asset of the bank, and as such might well be considered in measuring the value of stock at an assessment sale. In the assets of the bank this plaintiff at the time of the commencement of this action, was in no wise interested, either as a creditor of the corporation, or as an owner of its stock.

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This position appears impregnable, both in reason and precedent; the books are full of cases sustaining it, notably among those furnished in the brief of counsel which are at hand, (18 At. R., 824; 23 At. R., 224; 28 P. R., 788; 21 P. R., 894; 30 P. R., 46; 49 N. W. R., 197; 45 Fed. R., 668; 58 Fed. R., 986, and other cases.)

So that whatever may be his redress, the one here sought by the plaintiff is not the remedy. We think the demurrers were properly sustained, and find no error in the records to the prejudice of the plaintiff in error. The judgment of the common pleas is therefore affirmed at the costs of plaintiff in error, and the case is remanded for execution.

*John P. Wentzel and P. H. Kumler, Ridenour & Halfhill, for Plaintiff in Error.*

*H. P. Williamson, Ritchie & Ritchie, Wheeler & Brice, for Defendants in Error.*

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(First Circuit—Hamilton Co., O. Circuit Court—Jan. Term, 1899.)

Before Smith, Swing and Giffen, JJ.

THE CITY OF CINCINNATI, for the use of John Weisman,  
v. ANNA M. JOHNSON.

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*Resolution to improve sidewalk in Cincinnati—Must be read on three different days—*

Section 1694 Revised Statutes, relating to power conferred upon council, and requiring that an ordinance to improve must be read on three different days, etc., applies to resolutions to improve pending before the Board of Public Works of Cincinnati and its successors, the Board of Administration, and the Board of City Affairs.

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Appeal from the Court of Common Pleas of Hamilton county.

SMITH, J.

We are of the opinion that the same decree should be entered in this court as was entered in the court of common pleas.

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Section 2328, Revised Statutes, by various amendments, gave successively to the board of public works, the board of administration, and by the section as it now stands, to the board of city affairs of this city, in substantially the same language, the same right to provide by ordinance for the construction and repair of all necessary sidewalks within the limits of the corporation that was given by the first part of the section to councils of other municipal corporations, "provided, however" (in the language used), "that in cities of the first grade of the first class all duties and powers herein otherwise imposed on or conferred upon council in relation to sidewalks, or the construction or repair of the same, shall be exercised by the board of administration" (or of city affairs) "of any such city, and it shall not be necessary to have the action or concurrence of council in any of such proceedings."

This action is to recover an assessment made by the board of administration on the property of the defendant, for a sidewalk which was ordered by said board to be constructed, and which, on the failure of the owner to comply with the order, was constructed by the contractor under the order of the city, and then an assessment levied upon the property to pay the cost thereof, and this assessment transferred to the contractor.

The answer of the defendant, in effect, first, denies that there was any legal or valid assessment against her property for such sidewalk; and, second, it avers that before and up to the time that the plaintiff claims to have constructed said sidewalk, she herself had constructed and maintained said sidewalk in front of her said property, as ordered by the board of administration of said city and its predecessors in office.

The principal contention of the defendant, as we understand, is that the resolution of the board of administration ordering this improvement was not read on three different



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days by the board, nor were the rules requiring this to be done suspended, but it was passed on one reading; that by the statute of the state the council of any municipal corporation which has authority in the construction of sidewalks, must pursue this course, and therefore that the board of administration, which in this city has the same jurisdiction and power and must perform the same duties, must in the passage of the resolution act in the same way and as it was not done, that the decision of the supreme court in the case of Campbell v. Cincinnati, 49 Ohio St., 463, is decisive of this case.

We think this claim is well founded. Section 1694, Revised Statutes, certainly made it the duty of all councils having jurisdiction of matters of this kind to pursue this course. It is so mandatory in its requirements that if not complied with, the whole proceedings are void, as is held in the case above referred to. Section 2328, before mentioned, expressly provides that "all duties and powers herein otherwise imposed or conferred upon councils in relation to sidewalks or the construction or repair of the same, shall be exercised by the board of administration," etc. If it was the duty of council to so act, why was it not the duty of the board also? The same reason would seem to require it in the one case as in the other. It is for the protection of the citizens against hasty and ill-advised legislation.

But it is argued by counsel for the city that the statute in regard to the board of city affairs points out the mode in which its business is to be transacted, and that there is nothing in the statute which requires the reading of any such resolution or ordinance more than once, or makes any provision for a suspension of the rules. It is true that as to the board of city affairs now in existence, there are two sections, Nos. 2208 and 2209, which make some provision as to the manner in which the duties of such board shall be performed. For instance, section 2208 provides that the

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board shall hold daily meetings, and that three members shall constitute a quorum for the transaction of business; that the ayes and nays shall be called and entered upon a journal upon the passage of every resolution or order of any kind, and that no resolution or order shall be adopted unless three votes are recorded in its favor; while section 2209 provides that the board shall keep a complete record of its proceedings. So far as we can see, those provisions were not in force as to the board of administration, but if they were, we think that they only state additional requirements to be followed by the board, and do not in any way change the duty imposed upon it by the other statutes.

As before stated the claim is made in the answer that at the time this work was done by the city, defendant had a sidewalk in front of her premises, built by her in compliance with the order of the board of administration or its predecessor. We recall no evidence offered on this point, and place the decision of the case on the ground before stated

*H. K. Rodgers, for the City.*

*Frank M. Coppock, contra.*

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(Third Circuit—Hancock Co., O., Circuit Court—Dec. Term, 1898.)

Before Day, Price and Norris, JJ.

THE CITY OF FINDLAY, by M. G. Foster, City Solicitor,  
v. W. S. PARKER et al., Trustees of the Gas Works of the  
City of Findlay, et al.

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*Gas trustees—Incidental powers in management of gas works—*

- (1). When a city has under the law acquired a gas plant, to the end that the inhabitants may be provided with light and fuel, the power to operate the plant and to do the things necessary to accomplish the purpose for which the plant has been acquired, and to preserve the property from destruction and impairment to a degree not amounting to rebuilding or extension, is incident to and goes with the power to own as a current necessity.

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The City of Findlay v. Parker et al.

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*Same—Current expenses not within Burns law—*

- (2). Operating a gas plant of the character and for the purpose thus intended, is a business of hiring and buying and selling in which the current expenses are intended to be paid out of the income, and in relation to which it is not intended that each item of such current expenses shall be anticipated by certificate of the city clerk under section 2702, in order to make lawful the outlay for its payment.

*Gas Trustees are city officers—*

- (3). "The trustees of the gas works" of a city are "officers" of the city, as contemplated by sections 6976 and 1545-79, of the Revised Statutes, and are subject to the provisions and penalties of those sections.

*Gas trustee can not deal with Board--*

- 4.) When a municipality is allowed to embark in the business of buying and selling gas, those who conduct the business and control it, are not permitted by these sections, to directly or indirectly buy for it, and at the same time sell to it either material or labor.

*Same—Employment by board within one year of expiration of term of office—*

- (5). Neither may they direct its future policy while in office, and upon retirement within the time inhibited in section 6976, take advantage of opportunities which thus may be created.

Appeal from the Court of Common Pleas of Hancock county.

NORRIS, J.

M. G. Foster, as the city solicitor, on behalf of the city of Findlay, Ohio, brings this action by authority granted in section 1777, of the Revised Statutes. His petition offers for cause of action, that the city of Findlay owns a natural gas plant which supplies the city and inhabitants with natural gas for light and fuel. That the defendants, Parker, Cook, Funk, Baker and Welsh, are the trustees of the gas works of the city of Findlay, and constituting such board of trustees are in management and control of said gas plant. The salary of these trustees is fixed by the city council of the city of Findlay at \$200 per year each, which is the only compensation by law allowed them. That the council by

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resolution authorized said trustees to appoint and employ one of their number to go over the territory embraced in the gas leases of said city to look after said territory and the leases and rental payable under them, and to renew expiring leases and take new ones, and to perform other services about the operation of said gas plant. That the gas trustees acted upon this resolution of the council and fixed the compensation for the services thus to be performed at \$2.00 per day. And on the 12th of April, 1898, made a contract with the defendant, J. H. Cook, one of said trustees, and appointed him to do and perform these services and receive this compensation, and all this in addition to his duties and salary as such trustee. And that, to carry out and make complete this appointment and contract, said trustees intend to and will apply the funds of said city held by them as such trustees in payment and allowance of this salary and compensation unless restrained by the injunction of this court. And that the appointment of said Cook to do these things and the contract to pay him for the services in such employment is a misapplication of the funds of said city, and is in excess of and is an abuse of their powers as such trustees, and is all without legal authority. As another, and a further complaint, plaintiff says that the trustees, without authority from the council and against the law, passed a resolution which purports to create the office of general manager of the gas plant, and determines and fixes the salary of such general manager at \$1,500 per year, and under this self-created authority made the defendant, W. H. Gross, such general manager, and gave to him the direction and supervision and control of the operation of said plant, and made in this behalf with Gross a contract to that effect, agreeing thereby to pay him this salary, and that said contract is now being carried out by the trustees, and that the funds of said city now in the hands of said trustees are being and will be diverted to pay this salary. That this is

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all being done without legal authority, and is, and will be, a misapplication of the funds of said city, to prevent which it is necessary that this court interpose its injunction.

The fact which colors this act of the trustees with violation of corporate powers and breach of the law, is that Gross at the time of said contract and appointment had but just retired from said board of trustees as a member thereof, and that such employment and contract will cover the period of one year next immediately after he became such retiring member. That both of these contracts contemplated the misapplication of the city funds, to Cook as a serving trustee, and to Gross as an ex-trustee within one year after his term of service had expired. That no certificate of the clerk of said city was made as required by law, that the money to meet the expense incurred by these contracts, or either of them, was in the city treasury to the credit of any fund and not unappropriated, out of which payment could be drawn.

And plaintiff seeks to enjoin defendants from performing these respective contracts on their part or on the part of either of them, and from applying the funds of said city as contemplated by the terms of the contracts to the payment of these agents or either of them.

The defendants, the trustees of the gas works, filed a separate answer which, in substance, presents the necessity of the service contemplated by these contracts and the entire competency and integrity of the defendants, Cook and Gross, who are thus employed, and makes it appear clearly that the performance of the services by men who are experienced in that regard is for the safety of the life and property of the citizens and the preservation of the gas plant itself, and asserts that all these acts of the council and the trustees are evidence of due care and judicious management, and are cognizant with the authority of said trustees and the laws and ordinances under which they act.

The answer denies that execution of these contracts will

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The City of Findlay v. Parker et al.

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be misapplication of the funds of the city, and admits that Cook is a member of the board of trustees, and that Gross did but only just retire from the board when he was thus appointed, and that his service under such appointment will cover the year next immediately after his retirement from the board of trustees.

The defendants, Cook and Gross, file separate answers adopting the allegations and averments of the answer of the trustees. The case comes into this court on appeal, and the evidence reveals the facts to be as I have recited them in the statement of the case, that is to say, stripped of verbiage.

The city of Findlay owns a natural gas plant which was and is operated for the purpose legitimate to that branch of municipal economy, all in control of the trustees of the gas works of said city. This board of trustees is constituted by legal authority and governed by the laws which prescribe and limit its duties and powers.

The condition existed and exists which made necessary a man to look after the interests of the city in its gas territory and leases, and to engage in other kindred employment. The trustees by authority of the city council chose one of their number to perform these services, together with his duties as such trustee, and to receive the emoluments of the position in addition to his salary as trustee. He is competent in all respects, and his pay is not exorbitant for the services required. The exigency is present that makes it necessary, in order to preserve the plant and to make more safe the property and lives of the people of the city, that a general manager of the plant with all that the word implies, be selected and clothed with power to perform the duties demanded by that position, and for this office, the trustees, by authority in them considered to be vested, selected a man and clothed him with power to act, and fixed his salary and term of service.

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The man selected has but just retired from the board of gas trustees to which he had been legally chosen; he had retired by reason of the expiration of his term of office, and the period of his employment as general manager covered the year immediately next after the end of his service as a member of the trustees of the gas works of said city. He is exceedingly competent to discharge the duties of his new position, and the salary determined by his contract of employment is not exorbitant.

When these two contracts were made, no certificate had been filed by the city clerk that money requisite to meet the expense to be incurred under either of the contracts stood unappropriated to the credit of the proper fund in the treasury of said city.

It is claimed by the plaintiff that for this reason the trustees of the gas works had no authority to make the contract; and further, that as defendant Cook, was, and still is, a full fledged and acting member of said board of trustees, he was, and is ineligible to the employment required by the contract; and that Gross, being so recently a trustee, is not a person whom the board had authority to select as general manager; and that the action of the board of trustees is hence illegal in both instances, and without authority. These assertions of the plaintiff are controverted by the defendants, who claim that resting upon these facts, the acts of the board are in all respects in conformity to law, and within the scope of its authority. So that the only question is, did the board have the legal power to hire and pay Cook as he is hired and is paid, and to appoint and hire and pay Gross as general manager; the first being a member of the board, and the second just having retired at the end of his term.

Section 6976, of the Revised Statutes, provides:

“That an officer of any municipal corporation who is inter-

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ested directly or indirectly in the profits of any contract, job, work or service for the corporation, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation during the term for which he was elected or appointed, or for one year thereafter, shall be fined not more than one thousand dollars, nor less than five hundred dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office."

Section 1545-97, provides:

"That no contract for work to be done for or material to be supplied to the city or any department thereof shall be made with any councilman, officer or employe of the city, or with any firm, partnership, corporation or association of which such councilman, officer or employe is a member or stockholder, or by which he is employed in any capacity; and if, during the term for which he shall have been elected or appointed, he knowingly acquires an interest in any such contract, he shall forfeit his office."

There can be no doubt of the authority of the trustees of a gas works to employ such service as is necessary to carry on the business of the plant, and to preserve it and make its operation safe to life and property; all this lies within the radius of the use and purpose of the plant, and appears to be in contemplation of the law which empowers its construction, as incident to its establishment and control. When the law authorized the purchase and construction by the city of the gas plant to the end that the inhabitants might be provided with light and fuel, the things necessary to accomplish in a safe and reasonable manner, the object for which the plant had been acquired, and to preserve the property so constructed from destruction and impairment to a degree not amounting to an extension or rebuilding in whole or in part, are incidental to and go with, and continue with the power to construct and acquire and own as current necessity. The expenses thus incurred are but the current expenses of operating, and to require certificates of



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the clerk as a condition to authorize these current expenses, and to anticipate each item thereof, would render it almost impossible to operate an institution of the character at bar. So we do not think that the certificate of the clerk is necessary to make lawful an outlay of the kind arising under defendants' employment.

Now, while this is true, the legislature had in view the necessity of hedging in and making safe from probable and apparent dangers in every way possible, the treasury of a municipality. In the problem of municipal government which always confronts the law-making power, a looted treasury is in no wise in the back ground, and to prevent this the legislature has not and does not hesitate to resort to any device, coupling an infringement of the laws in that regard with fine and imprisonment and forfeiture of office, and hence the enactment of the sections from which I have just quoted. When a municipality is allowed to embark in a business enterprise such as operating a plant to furnish its inhabitants with light and fuel, and to carry on the business of buying and selling gas where of necessity the conduct and management and control of the business is in the hands of those who are not personally interested in the assets of the business, who take no part in its savings, who pay no part of its liabilities; who are strangers to its profits, and not directly affected by its expense, the necessity of every safeguard is most apparent. Those who conduct the business and control it, may not directly or indirectly both buy for it and sell to it either material or labor, and this however honest and competent may be the one who thus serves it. And an officer of a municipal corporation who has retired from the office to which he has been selected or appointed, may not be interested either directly or indirectly in any work or service for said corporation until the expiration of one year after his retirement from office. He may not direct or control its future policies while in office, and

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In Re Dellenbaugh.

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then upon retirement stand ready to acquire as an individual the harvest which he has hoarded as a public officer, and this however honest he may be, and however competent.

These trustees of the gas works are public officers; they are elected by the people, they qualify, they take the oath of office and give an official bond, and are entitled to the emoluments of the office, and without any of this, the nature of their duties make them officers of the corporation, and make more applicable to them than to any other officers of the municipality, these sections of the statute which look to the honest administration of every department of municipal government. And whatever authority the trustees of the gas works had to employ men to perform the services required of these defendants by the contracts here sought to be enjoined, these defendants, the trustees were not allowed to employ. The finding of the court is for the plaintiff, the city of Findlay, and against the defendants. An injunction is granted as prayed for in the petition; the costs are adjudged against the defendants, and the case is remanded for execution.

*G. M. Foster, George H. Phelps, Pendleton & Whitely,*  
for Plaintiff.

*Ross & Kinder, and W. F. Duncan,* for Defendants.

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(Eighth Circuit—Cuyahoga Co. O., Circuit Court—Jan. Term, 1899.)

Before Caldwell, Hale and Laubie, JJ.

(Judge Laubie of the Seventh Circuit taking the place of Judge Marvin.)

IN THE MATTER OF THE PROCEEDINGS AGAINST FRANK  
E. DELLENBAUGH.

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*Findings of the Court.*

As to the second specification, relating to the action of Judge

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In Re Dellenba

Dellenbaugh in hearing and determining this case, it appearing from the evidence that he assumed to act in a judicial capacity, he has no jurisdiction, and the remedy lies with the legislature by way of impeachment.

(For the decision of the questions of law see page 103.)

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HALE, J.

In the matter of the proceedings against Dellenbaugh for disbarment.

There was a sufficient discussion of the case in passing upon the demurrer, and there will be no further discussion.

In considering the evidence submitted in this case, we have found no fact against Dellenbaugh which was not supported by evidence.

We regard the case more in analogy with a proceeding than a civil action, and have given the respondent the benefit of any reasonable doubt out of a fair, careful and candid consideration. More than this, no fact has been established against the respondent that has not only been sustained by the evidence, but by the approving judgment of this court. We believe that we fully appreciate the gravity of the charges made and the care with which they should be taken in the consideration.

The statute under which these proceedings are brought is section 563:

"The supreme court, the circuit court of appeals, or the common pleas may suspend or remove from office, for either of the following causes: first, conviction of crime involving moral turpitude; second, unprofessional conduct involving moral turpitude."

That is as far as we need to read the statute.

The charges made are under the first and second provisions of the statute which I have read. The respondent is charged, first, with having been guilty of crime involving moral turpitude while in office as an attorney at law of the state of Ohio; and second, with having been guilty of unprofessional conduct involving moral turpitude. The facts relied upon

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charges, are embodied in three specifications of facts.

Specification first is, in brief, and in substance, that the respondent Dellenbaugh was, on or about the 30th day of January, 1895, employed by one Edith Manning as her attorney to render to her his professional assistance in relation to matters growing out of the alleged illicit relations between her husband, George A. Manning, and one Jane Doe; that after said retainer and while he was in the discharge of his duties incident thereto, the respondent was, on April 22, 1895, appointed to and assumed the office and duties of judge of the court of common pleas of the third subdivision of the fourth judicial district of the state of Ohio. That notwithstanding such appointment the respondent continued to act, under his retainer, for Mrs. Manning. That about the 1st of July, 1895, he associated with him Vernon H. Burke, an attorney at this bar. That on or about the 6th day of July, 1895, Burke, by the solicitation and at the request of the respondent, wrongfully, corruptly, and by threats of exposure of the illicit relations between Jane Doe and Manning, and by promises to shield her from exposure, obtained from her the sum of ten thousand dollars wrongfully and corruptly. It is conceded that the sum of ten thousand dollars was obtained; five thousand of it paid in cash, and notes for the remainder taken. Of the five thousand dollars, ultimately Mrs. Manning received two thousand dollars,—and Burke, or Dellenbaugh and Burke, received three thousand dollars.

We refrain from entering into a full discussion of the evidence in support and denial of the facts of this specification, as might be done, for the reason that the facts therein contained, are relied upon to support the charges made against Burke growing out of the same transaction, who has not yet been heard in his defense.

Something, however, must be said as to the respondent's connection with that affair.

Both the respondent Dellenbaugh and the witness Burke have given their testimony before us. The respondent's statement is to the effect that at the time he assumed the office of judge of the court of common pleas on the 22nd of April, 1895, he withdrew from the case of Manning v.

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In Re Dellenbaugh.

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Manning and turned it over to Burke, and thereafter had nothing whatever to do with the case. While Burke says that he was first called into the case on or about the 6th day of July, 1895, and that before that time he had no knowledge of the existence of such a case.

If we can rely upon the testimony of witnesses seemingly disinterested, neither of these statements can be strictly true.

It is conceded that Christian, a detective, was employed as a detective in the case, by the respondent Dellenbaugh. The time of that appointment is fixed by the respondent to have been on or about the 1st day of April, 1895; while the detective's testimony is to the effect that he was employed on the 29th day of April and subsequent to the time that Judge Dellenbaugh assumed his office as judge of the court of common pleas.

Christian, in the prosecution of his employment as a detective and while engaged in that employment as we understand, was arrested and brought before the mayor of the village of Glenville, and on a plea of guilty a fine and costs were assessed against him. This was on the 18th day of June, 1895. The next day after his arrest and after the fine had been assessed, both Dellenbaugh and Burke appeared before that official, and asked the release of the fine or judgment against Christian for the reason that he was employed by them and was in the legitimate prosecution of that employment—either employed by one or both. Each attempted to say that he went to see the mayor, and that the interview was had at the instance of the other.

The more reasonable supposition or the more reasonable conclusion from the evidence, is, that each was there because of his interest in the case in which Christian was engaged.

Further Christian testifies that his first acquaintance with Mrs. Manning was an introduction to her in the criminal court-room by Judge Dellenbaugh. There was, according to the testimony of Christian and Burke, a meeting at the Kennard House, in which were present Burke, Christian and Dellenbaugh, and the subject matter of dealing with Jane Doe was there discussed to some extent—Chris-

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tian and Burke both testified to that meeting; it is denied in toto by Judge Dellenbaugh.

We have, in the consideration of this testimony in which these two parties are so vitally interested, thought it safer to take the testimony of the third party, who had apparently no interest in the case. We are inclined to think that Judge Dellenbaugh is mistaken as to there being no such meeting at the Kennard House.

Again, as showing the connection of the respondent with the case, the money, as I have said before, came into the hands of Burke. Some of it was handled by the respondent Dellenbaugh; there is a difference as to how it came into *his* hands. It was by checks, drawn by Burke, payable to the order of Mrs. Manning. Those checks were endorsed by Dellenbaugh as attorney in fact for Mrs. Manning, and drafts and certificate of deposit obtained and forwarded to her. *He* settled with Christian — receiving the money from Mrs. Manning to do so. His statements before the investigating and trial committees, which he has corrected on this trial, give some countenance from his own lips to the fact that he was engaged in the case later than he now says. In particular before the trial committee he referred to what is known as the Russell-Glenn affair, fixing on that event which he now says, learning that it occurred long after he went upon the bench, leads him to say that he was mistaken in referring to it as one of the events that he was cognizant of. It would seem a little unnatural that the time should be the prominent thing rather than the event.

Again, the parties are at issue in the testimony whether Judge Dellenbaugh received any portion of the three thousand dollars or of the thirty-three hundred dollars which was ultimately retained by Burke. Upon that issue we have, not only the statement of Burke as to the payment by him, and the manner in which it was paid to Dellenbaugh, but he produces a check of one thousand dollars drawn upon the same day that the settlement was made; the check shows that it was paid. There is no evidence so far as we remember, outside of the check itself as to just when it was paid, but, perhaps, the fair presumption is that it was paid

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at its date. If that thing is a fiction, the bank books would show something about it, whether Burke drew or did not draw upon that day the currency from the bank. There is no attempt to controvert that fact. Whether there is anything in the fact that would be of any service whatever, I am not prepared to say, because there is no evidence upon that point; but the fact that Burke in connection with his testimony produces a check that was actually paid, is of some value.

Then, soon after this matter received its first airing through the newspapers, there was a meeting of the friends of Judge Dellenbaugh at the office of Wilcox, Collister & Hogan. There were two meetings in that office. At the first, several witnesses testified as to what Judge Dellenbaugh said, and they differ as to the statements he is said to have made. On the second occasion there were present Collister, Hogan, Henry and Dellenbaugh; they were then, at that time, interested for Judge Dellenbaugh; and they, Collister and Hogan both, say that he not only said that he had received one thousand dollars, but that he fortified it by saying that he had done the work in the case, and was entitled to it—that the work was done in the case, all but the finishing touches.

Now, looking to all the circumstances surrounding that transaction, they point in the direction that the respondent did get a portion of that money. In this we are not, as it will be seen, relying on the testimony of Burke only, who it is claimed is impeached by statements made out of court as detailed by witnesses, differing from those made, on the trial. That testimony, of course, was incompetent as tending to establish or negative the main fact as to whether he did or did not receive it. It is only competent to affect the value of Burke's testimony, and was admitted for that purpose alone. To what extent there was any substantial contradiction of facts, we need not discuss.

No one fact found by us rests upon the unsupported testimony of Burke who, of course, is deeply interested in the outcome of this transaction.

We find, however, that upon this question, his testimony is supported by the circumstances of the case, and also by the admissions of the respondent.

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So that we think that down to the time of the receipt of this money Judge Dellenbaugh was not keeping entirely aloof from the case. Burke's testimony, however, that he knew nothing of the case until July 6th, seems to be contradicted by other testimony upon which we ought to be able to rely. Miss Kent's statement is that a day or two, or a very short time before Judge Dellenbaugh took his place upon the common pleas bench, she with Mrs. Manning went to his office; that Mrs. Manning was there told by Dellenbaugh that he must withdraw from the case, that he would put it into the hands of Burke; that they thereupon went to Burke's office where Mrs. Manning was introduced to Burke, and that thereafter they frequently visited the office of Burke during the months of May and June, and witness Talcott says that his office adjoined that of Burke's, having the same reception room; that these parties at some time, Mrs. Manning and Miss Kent, were frequently at Burke's office over a period of a month or two—but of course, that may have been later. But after the receipt of this money and its distribution there was no call for the frequent visits of Mrs. Manning to Burke's office.

And we are inclined to think and to hold that during those months she was to some extent visiting Burke's office, and that he had something to do with the case.

But, coming to the facts immediately connected with the transaction in which the money was obtained from Jane Doe, what is the evidence? Except what may be gathered from the testimony of Christian, and the circumstances some of which I have referred to, the witnesses, who knew about what took place just prior to, and during the time and immediately after that event, are the respondent Dellenbaugh, Burke who is jointly charged with the wrong then committed, and Miss Kent. Burke says the arrangement under which he went to see Jane Doe, was made in the criminal court-room at a meeting in which Mrs. Manning, Miss Kent, Judge Dellenbaugh and himself were present; that they discussed the situation, and he was, either at his own motion or at the suggestion of the judge, the one who went to see Jane Doe, discussed the matter with her, received from her a proposition of settlement, reported the



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result of the interview back to the meeting that he had left, and after much discussion it was agreed that the proposition that had been made should be accepted, he having arranged for a meeting at his office the next morning with Jane Doe. While Miss Kent says that at Burke's office there was a meeting between herself, Mrs. Manning and Burke, in which they went over the reports which the detective had received, and there it was agreed that he from that place should go to see Jane Doe; that Burke left, did go, returned to the same place, and reported the result of the interview with Jane Doe; and that there they discussed the propriety of making a settlement; the next morning a meeting was had at the office of Burke, and the whole matter closed up, and that Dellenbaugh was not there at all. Miss Kent's testimony is not entirely satisfactory to the court, but she is the only really disinterested witness to that transaction—to the immediate facts of the transaction.

After giving as careful review of this as we are able, and under the rules that I announced that we have adopted, if the fact of the respondent's connection with this transaction of obtaining this money was to be determined by a mere preponderance of the evidence, we should not hesitate to hold him equally responsible with Burke; but there is such conflict of the evidence produced that we do not feel justified in finding that his responsibility for that particular transaction is established by clear and convincing evidence.

As to the second specification, we overruled the demurrer to the specification, for the reason that it is alleged that all that was done on the hearing and the determination of the divorce case, was done by him as the attorney of Mrs. Manning and was in no sense a judicial act.

On the evidence produced, we hold that in the trial of that case, he acted or assumed to act in his official capacity as a judge, and that the remedy for any misconduct or wrong done in connection therewith, should be in another tribunal.

*Specification Third.* Specification third is, in substance, that on the 28th day of October, 1896, the respondent Dellenbaugh pretended to hear and decide the divorce case of Edith Manning against George Manning. That all the

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time he was the real attorney in the case, although Burke, at his instance, was acting as the ostensible attorney for the plaintiff. That on and prior to this time there was no entry of the case upon the trial docket of the court, nor was there any entry of the case upon any of the dockets kept in the office of the clerk or by him, and no entry was made by respondent indicating that the case had been heard and tried upon any docket, the only entry having been made upon the file wrapper containing the papers. And very soon thereafter, Judge Dellenbaugh's official term as judge of the court of common pleas expired, at which time no journal entry had been entered upon the journal. That thereafter, respondent corruptly conspired with or instigated Burke to get upon the journals of the court a decree of divorce. That after an attempt through Burke to get upon the journals a decree not authenticated by any judge, and after the refusal of the three judges, or at least one of them, to authenticate such journal entry, and a refusal by said judges to allow said entry to be made, the respondent after the expiration of his term of office and while a practicing attorney, caused another decree to be prepared, which he endorsed "O. K., Dellenbaugh, Judge," which he took to the clerk to whom he falsely stated that the journal entry then produced was the original entry prepared in the case, and was by him, while judge, during his term, endorsed as therein produced, and against the positive orders of one of the judges at least, induced and procured the clerk to enter said decree upon the said journals of said court. The entry was made upon a blank space on the journal of date of October 28, 1895.

We are constrained to say that there is a web of wrongdoing running through this whole transaction.

Evidence is produced on the part of the prosecution, that Dellenbaugh first was solicited on behalf of Mrs. Manning to obtain for her a divorce. The witness Hickox testifies that he saw Judge Dellenbaugh for that purpose, inquired whether he would take a divorce case, and whether he would take Mrs. Manning's case. That afterwards, he being told by Judge Dellenbaugh that he must see Mrs. Manning before deciding, went with Mrs. Manning to Dellenbaugh's

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office, and there introduced her to Dellenbaugh and left. The judge says that he was introduced to Mrs. Manning by Mrs. Robinson of Pittsburg, at which time both Mrs. Robinson and Mrs. Manning were strangers to him; he ignores the entire facts testified to by Hickox.

It seems to us that there has been an undue effort to get away from the divorce case and to bring into prominence the case for the alienation of affections.

If we can rely upon the testimony of Hickox, the original start was for a divorce. However, we have shown, most clearly we think, that the respondent kept a watch over the case of Mrs. Manning from the beginning, or until the ten thousand dollars was received and distributed. The evidence is such in the case, that we are compelled to find that the respondent knew of the commencement of the divorce case; that he was cognizant of the most extraordinary efforts and proceedings taken to keep the case from the public, including the substitution of the name of Webster as an attorney in the divorce case. He was, undoubtedly, informed of the agreement to shield Jane Doe from exposure, and as a part of the plan to carry out that agreement the case was heard in the manner disclosed by the evidence—I mean the divorce case, without a single entry upon any of the dockets or records of the court indicating that any such case was pending. There was a trial such as it was, and a memorandum made on the file wrapper containing the papers, and this is all.

In this way the case was left when Judge Dellenbaugh left the bench. The journals of the court were then under the control of the then judges of the court. It was for them to determine what journal entries should and what should not go upon the records of the court. If, on investigation, the judges had ascertained all the facts concerning the divorce case of Manning v. Manning, as disclosed upon this trial, they would have been fully justified in keeping from the records of the court that decree, and insisting that the case be set down for trial, and the case regularly tried.

Judge Dellenbaugh's official term had expired, and he had no official authority over any of the court records.

It is conceded that there was an effort at some time to

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In Re Dellenbaugh.

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get a journal entry on the journal that had not been O. K.'d.

Judge Lamson says that he was in room one at the January term, 1896, and it came to his knowledge through the clerk that there was an attempt to put upon the journal such an entry, which he stopped. Judge Ong succeeded him in room one at the April term. It is beyond dispute that Burke went to the clerk with a decree not authenticated or O. K.'d. The clerk referred him to Judge Logue who was in room six; he interviewed Judge Logue, who refused to make the entry by which the journal could be properly made. He returned to the clerk. The clerk thereafter took the journal entry himself, went to Judge Logue—some of the testimony showing that Mrs. Manning was with him; the clerk does not remember that she was. Judge Logue still refused to allow the entry to go upon the journal, but suggested that they consult Judge Ong who was in room one, which was done, and he not only refused, but directed that it should not be journalized. Thereupon the clerk handed the journal back to Burke with the instruction that none of the judges would authorize its entry. After that Judge Dellenbaugh brought to the clerk a journal entry having upon it "O. K., Dellenbaugh, Judge." He stated to the clerk that that was the original entry drawn; that it had been O. K.'d by him while upon the bench, and was all regular and should be entered. The clerk said to him "Well, that obviates all objections, and I will enter it." But he afterwards saw Judge Ong who again told him (the clerk) to keep it from the records.

It is conceded that there was this controversy over getting this journal entry upon the records. When did it take place? In the first place, Judge Logue says he was in room six when that happened. He was in room six in November and December, 1895, and in room six, April term, 1896. Judge Ong was in number one at the April term, 1896. Judge Lamson was in number one at the January term, 1896. It seems to us very plain from the statements of the judges, that that controversy took place at the April term of 1896.

Judge Dellenbaugh's explanation and statement to us is,

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In Re Dellenbaugh.

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that on the day the case was heard before him, or on the following day, a journal entry in the Manning case was handed him which he O. K.'d and gave back to Burke. That after the effort was made by Burke to get the first journal entry recorded, he succeeded in finding this original journal entry in the office of Burke, and took it to the clerk with the statement above quoted.

Now, both of these journal entries are typewritten. The stenographer who took the entries in short-hand and wrote them out upon the typewriter, says that the first journal entry, the one that was not O. K.'d, was made between the 12th of October and the 11 of November, and she produced her note books at the time her deposition was taken. This journal entry is an exact literal copy of the journal entry produced here upon the trial that was not O. K.'d, letter for letter. The second decree, according to the testimony of the stenographer, was dictated to her between the 10th day of April and the 16th day of April, 1896, and that, too, is an exact copy of the decree that bears the authentication of Judge Dellenbaugh.

There is no effort made to impeach these statements of the stenographer, or to show that there is any mistake about it, or that there is anything suspicious about her note books. It corresponds with the recollection of Ong and Logue. This is not all. This case had its number 53176 at the time of its commencement; it went upon no indexes or docket kept in the clerk's office. The journal entry finally goes upon the record, and is indexed with those cases that had their origin in the summer of 1896.

This particular case, we think from the testimony, was indexed from the journal to the appearance docket by Nicholas, and he began that indexing in April, 1896, if we have the testimony correct.

On the alphabetical index, the cases before 53176 are numbers 56079 and 56080, commenced in May, 1896; the one after, number 56427, bears the date of commencement July 1st, 1896. It was transferred to an execution docket that was commenced the latter part of July or the first of August, 1896. It is said that this journal is in the handwriting of Brown, a witness. It is on a space left in the

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journal. Brown testifies to having made some mistake in the paging of the journal, and correcting it afterwards. It is shown that the cases upon the pages before and after the Manning case have not been changed.

It is said that a man by the name of Ewing who was the bailiff in Judge Dellenbaugh's room at the time the divorce was heard, received this journal entry and handed it to Judge Dellenbaugh. We have not the slightest idea that Ewing remembers this particular case, from his own testimony. Some of this testimony looks as though it was made to fit a theory rather than facts which parties really know.

It is perfectly apparent that the journal entry which Judge Dellenbaugh took to the clerk, bearing his O. K., could not have been in existence at the time he left the bench, November 2, 1895, and the same was not and could not have been O. K.'d by him before that time, and that his statement to the clerk was not true. By these false statements the clerk was deceived and the express orders of the judges, or at least one of them, were disregarded and evaded. Whatever the effect may be, these are facts so clearly established, there can be no reasonable doubt of their existence.

We, therefore, find the charges made against the respondent sustained by the facts specified and alleged in this third specification.

Similar charges are made against Burke, growing out of the joint action of the parties, and we deem it best to withhold the fixing of any penalty in this case until that case shall have been determined.

*White, Blandin, Hills and Hadden, for Prosecution.*

*Ingersoll, Boynton and Hogsett, for Respondent.*

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In Re Burke.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Jan. Term, 1899.)

Before Hale, Caldwell, and Laubie, JJ.

(Judge Laubie of the Seventh Circuit taking the place of Judge Marvin.)

IN THE MATTER OF PROCEEDINGS IN DISBARMENT  
AGAINST VERNON H. BURKE.

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CALLWELL, J.

In this matter two charges have been made against Vernon H. Burke.

First, with having been guilty of misconduct in office as an attorney at law of the state of Ohio, and

Second, with having been guilty of unprofessional conduct involving moral turpitude.

Under these charges are three specifications.

The first is, that Vernon H. Burke and one Frank E. Dellenbaugh on the 1st day of January, 1895, and thence afterwards at all the dates and times mentioned, and thence continuously thereafter to the present time, were and still are, each of them, attorneys at law of the state of Ohio, licensed as such and practicing as such attorneys in the county of Cuyahoga and state aforesaid, and in this honorable court. That on or about the 30th day of January, 1895, said Frank E. Dellenbaugh as such attorney, was duly employed and retained in his capacity as such attorney in said county, by one Edith Manning of said county, then the wife of George A. Manning, to render to her his professional assistance and advice in relation to matters growing out of alleged illicit relations then and theretofore and thereafter existing between the said George A. Manning and one Jane Doe, of said county, and to obtain evidence of said relations, and to devise in relation to legal proceedings to be taken upon obtaining said evidence, and to prosecute legal proceedings. That thereafter, about April 22, 1895, said Frank E. Dellenbaugh was appointed and qualified and assumed the office and duties of judge of the court of common pleas of the third subdivisions of the fourth judicial district of the state of Ohio, and thereafter and

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In Re Burke.

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during all the time hereinafter mentioned, the said Frank E. Dellenbaugh continued to be and act as such attorney for said Edith Manning in said matters, under his said employment and retainer, but desiring to conceal the fact that he still was, and was still acting as such attorney at law in said matter for said Edith Manning, he did on or about the first day of July, 1895, solicit and procure said Vernon H. Burke as such attorney at law to become the ostensible attorney for said Edith Manning in said matter, and to render the professional assistance and advice to said Edith Manning in and about said matter.

The said Vernon H. Burke as such attorney, then well-knowing all and singular the premises aforesaid by the solicitation and procurement, and as the agent of said Frank E. Dellenbaugh as such attorney at law, did on or about the first day of July, 1895, accept such employment, retainer and agency, and thereupon as such attorney at law, and by the solicitation, procurement, and at the request and as the agent of said Frank E. Dellenbaugh, on or about the 6th day of July, 1895, in his professional capacity as attorney at law, did wrongfully, corruptly and unprofessionally threaten the said Jane Doe to publish and expose the said illicit relations between her and the said George A. Manning and thereby to bring scandal and disgrace upon her, the said Jane Doe, and did then and there agree with the said Jane Doe that in the event that she paid the sum of money then demanded of her, to-wit: ten thousand dollars, that she should be shielded and protected from exposure and disgrace, and her name suppressed and concealed, in case divorce proceedings were thereafter commenced by said Edith Manning against her husband George A. Manning, and by means of said threats and said agreements the said Vernon H. Burke did then and there gain and receive from said Jane Doe, on or about the 8th day of July, 1895, the sum of five thousand dollars in cash and her promissory notes, one for the sum of two thousand dollars, payable in ten days after that date, and six promissory notes for the sum of five hundred dollars each, and payable respectively in three, six, nine, twelve, fifteen and eighteen months from said date, all of which notes were afterwards paid, and the said Vernon H. Burke did charge and receive as a profes-



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sional fee for said acts the sum of \$3,300 00, and on the 8th day of July, 1895, at said county, did pay \$1,000.00 thereof and on the 18th day of July, \$100.00 thereof, to the said Frank E. Dellenbaugh. He, the said Vernon H. Burke, then and there did all of said acts by him done as aforesaid, in the manner aforesaid, for the sake of gain and to conceal the fact that the said Frank E. Dellenbaugh was interested, retained, employed or concerned in said matter while being such judge, as aforesaid.

Now, considering the evidence under this specification given in the Dellenbaugh case, we said, that as to the time when Judge Dellenbaugh employed Burke in the case, there was some doubt; the preponderance of the evidence tending to show that Judge Dellenbaugh employed Vernon H. Burke to act as attorney in the case, on or about the 1st day of July, 1895. There was in that case some evidence introduced tending to show that Judge Dellenbaugh employed Vernon H. Burke in the case, as early as the latter part of April, 1895, and that he himself had nothing to do with the procurement of the money as alleged in the specification after the time of the employment of Vernon H. Burke, and this evidence tended to show that after the employment of Burke in the latter part of April, Dellenbaugh took no active part in the case, so far as obtaining this money is concerned. Upon this state of the evidence in that case, we held that the specification was not so clearly made out as against Judge Dellenbaugh that we could say that it was proven beyond a reasonable doubt, that it was clearly and satisfactorily proven, although we did determine in that case and so announced, that the weight of the evidence was, that Judge Dellenbaugh remained in the case until after the settlement was made and the money received, and until all the acts charged under specification one to have been done by Dellenbaugh and Burke were completed. We were satisfied in that case without any doubt that Judge Dellenbaugh did receive the \$1,100.00 of the money received from the party named in the specification as alleged therein, as one-third of the fees received by him and Burke for the procurement of the money.

As the evidence now stands before us in this case, Judge Dellenbaugh is not on trial in this hearing, and the evi

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dence that raised the doubt in the minds of the court is not now before us, but as the matter now stands in this hearing, the evidence shows that Judge Dellenbaugh and Vernon H. Burke acted jointly and together as attorneys for Mrs. Manning throughout, as charged in the first specification. I mention this matter here, because in treating the evidence now before the court, it must be treated as though Dellenbaugh and Burke acted together in all that is charged to have been done under specification one. And while thus treating the testimony, we would not have it inferred, that we mean to say by so treating, it that Judge Dellenbaugh, as a matter of fact, was fully and completely connected with all the acts charged in specification one, but only as bearing upon the character of the acts of Vernon H. Burke under said charge.

I will not undertake to rehearse here all the testimony connecting Vernon H. Burke with the acts and things named in the specification which I have recited, but only such testimony as is necessary to determine the nature and character of the act or acts which the testimony shows him to have done, and the part which he has shown by the evidence to have taken in the procuring of the money named in the specification.

The evidence shows in this case, that a party by the name of Hickox went to Judge Dellenbaugh sometime in the spring of 1895 and told Judge Dellenbaugh that Mrs. Manning desired to have him take for her a case for divorce against her husband, and it was there arranged between Judge Dellenbaugh and Mr. Hickox that Mrs. Manning should come in and see Judge Dellenbaugh. Mrs. Manning on the next day appeared in the office of Judge Dellenbaugh and Judge Dellenbaugh took her case. Judge Dellenbaugh set about procuring evidence of the relations between George A. Manning and the lady known as Jane Doe in this case, and proceeded for sometime without calling a detective; but sometime in April, 1895, he called to his aid the detective Mr. Christian. Mr. Christian put different persons who were in his employ, upon the case and certain evidence was obtained as to the relations between these parties. In the first part of July, 1895, after Mr. Christian had obtained the evidence above referred to, Dellenbaugh,

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Christian and Burke had a meeting at the Kennard House in Cleveland, in which it is testified by Mr. Christian, Dellenbaugh said that Christian had done a good thing, and that the matter was now ripe and that something should now be done to bring the matter to a conclusion, and he said to Christian, that on account of his being on the bench, he could not write a letter to the lady in question, and asked Christian whether he, Christian, should write the letter, or whether Dellenbaugh should have Vernon write the letter. That same day or the day following Burke had a conversation with Dellenbaugh to this effect, as narrated by Mr. Burke:

"He, Dellenbaugh, told me that it was a good matter, and he would arrange to turn it over to me; he didn't know definitely whether he could turn it over to me or not, but he would see the parties; they would be down in a day or two, and then he would let me know. He didn't tell me what the nature of it was at that time, at least he didn't tell me the names of the parties nor the facts."

On the 5th of July, 1895, Mr. Burke met Judge Dellenbaugh again in the court-room proper, the large room, and Mrs. Manning and Miss Kent were in the judge's private room, Burke says that the judge related then to him the facts—

"And told me all about who Mrs. Manning was, who Mr. Manning was, and who the other party was. He told me that there was a good claim there, that we ought to get considerable money out of it. He said he had taken occasion to look the party up and she was worth any way twenty thousand dollars. After a little talk of that sort Judge Dellenbaugh took me into the private room in No. 7, the private room; he introduced me to Mrs. Manning and Miss Kent. We then had a conversation in reference to the facts, Judge Dellenbaugh doing practically all the talking. Judge Dellenbaugh reiterated what he had already said about Mr. and Mrs. Manning living happily together before this woman came between them, and he said that this woman had been watched and detectives had followed her to different places, told me various places that he had followed this woman with Mr. Manning; spoke about finding them out at a place by the name of Russell Glen in

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Glenville; told me about Mrs. Manning and some other woman, I don't know whether it was a Mrs. Robinson or who she was, going down from his office to the place where this woman was located, and finding Manning there, and also told me that Mrs. Manning had been ruined, and what a good woman she was. The judge said that this woman ought to pay twenty thousand dollars. Mrs. Manning insisted that she ought to pay twenty-five thousand dollars. The judge said that I should not neglect this, that I should take hold of it and rush it right through; that I had better go down and see if I could see her then. I left the judge and Mrs. Manning and Miss Kent in the private room off No. 7, and went directly down and saw this other party. I was gone probably half an hour. I came back, the judge was there, and I stated to them that I went down as the judge had told me, and talked with her about it; charged her with these different things some of which she admitted, and one of which she denied. The Russell Glen matter she said was not true. I said that she said she couldn't raise twenty thousand dollars. In the first place, as I remember, I said that she wanted to settle; she told me that she wanted me to see Mrs. Manning and see if it could be settled, and wanted to know what it could be settled for. I told her that I didn't think it could be settled for less than twenty thousand dollars. She said she couldn't raise that, she didn't have it; and she said if she had time she might get half of it, ten thousand dollars, but she couldn't raise even five thousand dollars now without selling some stock and disposing of some of her jewels. When I told the judge that, he said it was not so, that she had twenty thousand dollars, he knew that. That I told him, no, I didn't think so. 'I am satisfied that this woman wants to settle this law suit; I don't believe she has got it. She said she would have to sell some stock and her jewels in order to raise five thousand dollars.' Mrs. Manning said that she understood she had twenty-five thousand dollars and she wanted all she had. I said I was satisfied that if she raised ten thousand dollars, that was all she could raise. I told them that she had agreed to be at my office in the morning and wanted to know whether Mrs. Manning would take the proposition of ten thousand dollars or not. Finally

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In Re Burke.

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the judge said, to take it, and have her pay five thousand dollars down; that her notes were perfectly good; that if she paid five thousand dollars, she certainly would not let her notes go to protest. With that the judge and I walked out of the room. There the judge said to get this thing settled up, not to neglect it, but to get it settled up in the morning right away, and he said 'whatever settlement you make, and you can get ten thousand dollars from her, you take one-third of it, and out of it I will take one-third, and you may have two-thirds;' and I said 'that is perfectly satisfactory to me.' "

Just prior to the publication of this matter in the World, Burke had a conversation with Judge Dissette in which he went over the facts quite extensively, connected with this specification, as well as some of the facts connected with the other specifications, and Judge Dissette's testimony is to the effect that Burke went on and related to him his first connection with the case in the early days of July, 1895, and narrated the conversation held at the Kennard House, and went in detail over all the facts of the entire matter; and in that conversation Judge Dissette swears that Burke told him that Judge Dellenbaugh instructed him to go down and see the party and to strike her for twenty thousand dollars. That he had looked up her financial standing, that she was worth twenty thousand dollars, that he should strike her for that amount. Burke said:

"I went down from the court room to see the party and told her what my business was, told her something about what the detectives had said, and talked with her, and she collapsed, she was all broken up. She protested that it would ruin her; that if this thing got out it would be her ruin, and he said that after a while she said that she could not afford a scandal, said she hadn't been at the house of assignation or prostitution where they had charged, that she hadn't been there at all, but she could not have this scandal; she couldn't have it get out. Burke said to her that he was not prepared to say whether Mrs. Manning would consider a proposition of settlement at all, but she immediately said, 'how much do you think it would take to settle it', and Burke said 'I don't know whether Mrs. Manning would consider a proposition of that kind, but I think

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In Re Burke.

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about twenty thousand dollars,' and the party said she couldn't pay twenty thousand dollars, she couldn't pay it; she couldn't raise that much money, but if they would give her a little times he could raise ten thousand dollars just about half of it; and then went back to Judge Dellenbaugh with that proposition, and finally they concluded to take ten thousand dollars and they got ten thousand dollars."

And Judge Dissette said to Burke:

"Why, Vernon, that was a cold blooded piece of business."

He said:

"It was; it was the coldest blooded thing I ever was engaged in. I have been sorry for that little woman ever since, because she protested that she was innocent of that offense that was charged."

And in that conversation as narrated by Judge Dissette, Burke told him of the final settlement of the matter, of the payments made, and of the division of \$3,300.00 of \$2,200.00 to Burke and \$1,100.00 to Dellenbaugh, and narrated the whole matter.

Mr. Burke in his testimony in the Dellenbaugh case put somewhat of a different version upon the conversation he had with Jane Doe from what he did in his testimony before the trial committee or from what he did in his conversation with Judge Dissette. He seems to shade it a little in the direction of tending to show that he represented to Jane Doe on that occasion of his first visit to her, that she had robbed Mrs. Manning of a husband, had practically taken him away from her, and that Mrs. Manning was about to prosecute her for the abnegation of the affections of her husband. In all these conversations narrated by Burke to Judge Dissette, narrated before the trial committee and as narrated by Burke on the Dellenbaugh trial, it appears that the main thing considered by these attorneys and their client at their conversation before going to see this woman and after Burke's return from visiting her, was how much money has she got? How much can we get? Dellenbaugh said it was a good thing, "We ought to get considerable money out of it." He had looked the party up and she was worth anyway twenty thousand dollars; and as narrated by Burke to Judge Dissette, that he should strike her for

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twenty thousand dollars. In the first talk with Dellenbaugh and Mrs. Manning, Dellenbaugh said she should pay twenty thousand dollars, and Mrs. Manning said twenty-five thousand dollars. Dellenbaugh said Burke should rush it right through and go down and see her then and hurry the matter up when Burke returned from seeing the woman, he informed Dellenbaugh and Mrs. Manning that the woman hadn't twenty thousand dollars; Dellenbaugh said he knew better; she had twenty thousand dollars. Dellenbaugh wanted to know if Burke had found out anything about her property affairs, and Burke said no, and Dellenbaugh said he knew she was worth twenty thousand dollars. Mrs. Manning then again said that she understood she was worth twenty-five thousand dollars and she wanted all she had. And after they had agreed to take the ten thousand dollars, Dellenbaugh said "Fix it up tomorrow, right away."

Now, down to this settlement there had been no petition framed for alineation of affections, nor does the evidence show that any consideration was had between the parties interested as to what the actual damage in the case was. The evidence shows that Jane Doe was horrified at the idea of a scandal coming out involving her, and the main thought in her mind was to keep the scandal suppressed, and when the next day the matter was settled up between her and Mr. Burke, she exacted from Burke at that time a promise that she should be protected and her name kept out of the paper, or, as testified to before the trial committee by Burke, "That she should be shielded."

The evidence does not show, nor is there any evidence tending to show, that the parties had up to that time ascertained the facts to be that Jane Doe had alineated the affections of Manning at all. From all that appears in this case there is nothing to show that she had enticed him away from his wife, or that anything had been done by her to wrong Mrs. Manning of the affections of her husband.

Under this testimony it becomes the duty of the court in this case to say whether the intent and purpose in getting the ten thousand dollars was to get a reasonable compensation for any injuries that Jane Doe may have done to Mrs. Manning, or whether that was entirely ignored, or was of such subordinate consideration that it played no part what-

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ever or but little part in guiding the parties to the amount that should be demanded of Jane Doe, or the amount that was received from her.

It is clear in this case, that so far as Jane Doe is concerned, one of the principle considerations, if not the principle consideration for her paying the ten thousand dollars, was to shield herself from an open scandal, and this induced her to part with the money. The promise was made to her, that she should be protected and her name kept out of the papers; that her name should in no manner appear in any proceedings that were had for a divorce on the part of Mrs. Manning against her husband.

The question then is, under this testimony, was this demand made purely as a compensation and a reasonable compensation for an injury done to Mrs. Manning by Jane Doe, or was it the purpose and intent to extort from Jane Doe the largest amount of money possible without any regard to the amount of injury actually done?

There is another matter that bears upon this question that goes a long way toward showing the intent of the attorneys who acted in the matter for Mrs. Manning. If they intended to exact only enough money to compensate for the actual injury done and that the ten thousand dollars as an exact equal of the amount that Mrs. Manning had suffered, then it seems very strange that they should take from that amount one-third or \$3,300.00. It is hard to conceive, how attorneys could believe, that if they had obtained for their client only just dues, how it would be possible for them to charge her one-third of that amount for an amount of work and labor that would not call for fees to the extent of but a small fraction of the amount they received. If the intent was to charge Jane Doe \$6,700.00 as an equivalent to the amount suffered by Mrs. Manning, and enough more to pay her attorneys a reasonable fee, then certainly demanding and receiving \$3,300.00 for such services would be an extortion that could never be justified by any court.

The evidence under these specifications cannot fail to impress a court, that the line of action mapped out by the parties after getting their facts, was this: Dellenbaugh said:

"Now, Burke, you go over and strike her for twenty thousand dollars. This with the rehearsal of the accusa-



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tions, will paralyze her and before she can recover from the shock, rush her, before she has time to regain deliberation or get counsel, into a settlement for that amount."

Burke went; he struck her for twenty thousand dollars; she collapsed; he tried to push her into the contemplated settlement, and the only reason why she escaped with only ten thousand dollars, was because of her inability to raise the twenty thousand dollars, and her plea for mercy touched a tender spot in Burke's heart and he pitied that poor little woman. No attempt is made by Burke's counsel to justify the part he took in this action. The only plea on his behalf is by way of an apology for his conduct. It is said that he was the dupe of another and much older lawyer and was made to believe the part he took was justifiable, and a powerful plea is made for mercy, because of his ignorance and the influence of his superior over him. This plea does very great injustice to the intelligence of Mr. Burke—It was not the intellect that was at fault.

Our conclusion in this matter is, that in demanding this money no regard whatever was had to the amount of any just claim that existed against the party from whom it was demanded, but the only object and purpose was, to demand and receive all that it was possible to get under an implied threat at least, that if the same was not paid, she would be exposed, and under the direct promise that if she paid the same, she would be protected and shielded and her name in connection with the affair kept from the public. This being true, the intent was an evil one, was a wrong one, and the act is one that cannot be justified, and the defendant Burke is guilty as charged in specification one.

But it is urged on behalf of the defendant that this does not amount to blackmail, and that, if they believe the charges against Jane Doe were true, that the defendant cannot be found guilty in this action. This raises two questions of law, and before proceeding to consider these two questions, I will say that it is not necessary in an action of this character, to show that the defendant has committed a crime known as blackmail, but all that is necessary is to show that he has been guilty of unprofessional conduct in his office as an attorney, or of unprofessional conduct involving moral turpitude. And an act may amount to mis-

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conduct in the office of attorney without amounting to a crime. It is insisted on behalf of defendant that he made no threats to Jane Doe at the time that he first visited her nor at any other time, and that the specification is not true that the money was obtained by threats, but, on the contrary, the language used is insisted, shows that he did nothing more than to state to her the facts, and that the proposition to settle the matter up came from Jane Doe, and the proposition that she made was accepted, and that that is all that the defendant had done in this case, and that that does not amount to threats or to extortion.

As we understand the law bearing upon this, no precise words are needed to convey a threat. It may be done by inuendo or suggestion, and to ascertain whether language conveys a threat, it must be taken with the circumstances under which it was spoken and the relations between the parties are to be considered, and then, if it can be found that the purport and natural effect of the language amounts to a threat, then the mere form of words is unimportant. Any language which conveys with sufficient clearness to be understood, the proposition that a charge will be made is enough. The threat may be bluntly spoken or it may be thinly veiled in suggestive terms. Now, if it is necessary to prove a threat couched in so many words, then perhaps the language used by the defendant on this occasion might not amount to a threat. But if it is sufficient to show, that by any form of expression actually used, such a proposition was intended to be conveyed and was so understood, then the threat appears ample for the action. There are many cases bearing out this view of the law: *Regina v. Mengge*, 3 E. & F., 310; *People v. Thompson*, 97 N. Y., 313; *Moore v. People*, 69 Ill., App., 398; *People v. Choynski*, 95 Cal., 640; *People v. Toneille*, 81 Cal., 275; *People v. Gillian*, 50 Hun., 35.

Under these authorities and under what I have said heretofore in regard to the facts under this specification, it most clearly appears that what was said on the occasion of this interview taken in connection with the surrounding circumstances as well as what took place immediately thereafter this entire interview amounts to a threat, and that the object and purpose of the threat was to extort money.

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The next proposition to be considered, is, whether, admitting that the parties believed that Jane Doe was guilty of the acts of which she was threatened to be exposed, does that belief exempt the defendant from the threat he made? This question has been considered by the supreme court of the state of Ohio, in a manner that bears more or less directly upon the facts in this case. I refer to the cases *Elliott v. The State*, 36 Ohio St., 318, and of *Mann v. The State*, 47 Ohio St., 556. In *Commissioners v. Coolidge*, 128 Mass., 35, the trial court was asked to charge these two propositions:

"First. That the jury must find that the defendant must have maliciously intended to obtain that which in justice and equity he knew he had no right to receive.

"Second. That if defendant believed that, Chapin actually owed him the sum of ten dollars when he wrote the letter, he is not guilty of the offense charged."

The court in reviewing these letters, held:

"The trial judge properly refused these charges." And held further that "the trial judge was right when he said: The law did not authorize the collection of just debts by maliciously threatening to accuse the debtor of a crime; that it is proper to say that a threat made by one who is accused, whose goods have been stolen, that he would prosecute the supposed thief for the offense if there were grounds to suspect him to be guilty, could not be considered as made maliciously and with intent to extort money, unless there were other proofs of malice and intended extortion." *Motsinger v. The State*, 123 Ind., 498, is to the same effect. As I understand the cases above referred to in our own state as well as others, the rule laid down in this: That if a party demands from one who has his property or is indebted to him the amount that is due him or his property to be returned to him, and threatens, if it is not done he will commence proceedings against him either for the debt or for the wrongful taking of the property, that there is no intent in such communication to extort money, but simply to receive what is due. But, on the other hand, if the intent is to extort more than is due, or something that the party has no right to, or more than he has a right to have, for the purpose of gain, or for the purpose of making the party

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from whom the payment is made to suffer, then whether or not the party believes the crime or act charged is true or not, is immaterial.

People v. Eichler, 75 Hun., 27; People v. Wightman, 43 Hun., 358.

We see in these propositions of law no obstacle in the way of holding in this case that the threat made and money demanded was an exhortation without any reference to any just sum of money due, and was made for the purpose of gain, and that therefore the law as well as the facts warrant us in holding as we do, that the defendant is guilty as charged in the first specification.

The substance of the second specification is, that said Vernon H. Burke and one Frank E. Dellenbaugh on the 1st day of January, 1895, and thence forward at all the dates and times hereinafter mentioned, and thence continually thereafter to the present time, were each attorneys, as alleged in the first specification. Then it narrates the facts as detailed and found in the first specification, and then proceeds in substance as follows: That said Frank E. Dellenbaugh and Vernon H. Burke, agreed and promised Jane Doe that they would shield and protect her from exposure in any divorce proceedings that might be begun by Edith Manning against her husband George A. Manning, and for the purpose of carrying out that promise, said Burke did wrongfully, corruptly and unprofessionally in conjunction with the said Frank E. Dellenbaugh as such attorney at law and for the accomplishment of the ends, objects and purposes as aforesaid, draft a petition for divorce in behalf of Edith Manning against her husband George A. Manning alleged herein in substance as ground for a divorce, only that the said George A. Manning had failed to furnish the necessaries of life for the year preceding to the said Edith Manning, but not alleging that he was able to do so nor that he had been guilty of gross neglect of duty, and further alleging that the said George A. Manning had used towards the said Edith Manning abusive and disrespectful language, but not alleging what the language was, nor that it was used in the presence of others, nor that it occasioned her bodily ill, nor that it amounted to extreme cruelty, and further alleging that as the only other ground for a divorce,

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that the said George A. Manning had at divers times and places in the city of Cleveland to said Edith Manning unknown, committed adultery with divers persons to Edith Manning unknown, praying for a divorce and the restoration of plaintiff's maiden name, and in conjunction with the said Frank E. Dellenbaugh, for the further and more successful attainment of the purposes aforesaid, signed the name of another attorney at law, to-wit: George N. Webster, to said petition, and to the precipe thereon, although the said George N. Webster was not the attorney in said case and had nothing whatever to do therewith, and did thereafter, on the 25th day of July, 1895, file said petition and precipe with the clerk of the court of common pleas of Cuyahoga county, Ohio, and procured the issuing and service of the summons thereon with a certified copy of the petition therein upon the defendant therein, George A. Manning, and did in conjunction with said Frank E. Dellenbaugh and in further prosecution of the said purposes, and to prevent the publicity of said action, did prevent the making of any entries in said cause, excepting only the serial number thereof upon the appearance docket of said court, or upon any of the dockets or calendars of said court, and did procure the sheriff of said Cuyahoga county to make no entry of said suit or his doings therein upon the books kept in his office as by law he was required to do, and did further in conjunction with the said Frank E. Dellenbaugh, make a secret agreement with the said George A. Manning as to the amount of alimony to be paid by him, and did thereafter in conjunction with the said Frank E. Dellenbaugh, procure said cause to be advanced for trial by the said Frank E. Dellenbaugh as such judge, in violation of law and the rules and practice of said court, without written motion, affidavit or notice, and without any good cause therefor, or for any cause other than the desire of the said Vernon H. Burke and Frank E. Dellenbaugh to have said cause heard by said Frank E. Dellenbaugh pretending to act as such judge in said cause before his term of office expired, and which term of office would and did expire on November 2nd, 1895, said case not being in order for trial in its order on the docket as required by law until long after that date, and he did further, in conjunction with the

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In Re Burke.

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said Frank E. Dellenbaugh, on the 28th day of October, 1895, at said county, procure said cause to be heard by the said Frank E. Dellenbaugh pretending to act as such judge therein, secretly, upon incompetent and insufficient evidence, and without any evidence of the adultery of the defendant George A. Manning, and in conjunction with said Frank E. Dellenbaugh, did in further pursuance of said purpose and design, cause and procure an entry to be made dated of said 28th day of October, 1895, by said Frank E. Dellenbaugh, who was then and there pretending to act as such judge therein, upon the file wrapper made to contain the papers on file in said cause in said court, with entry upon the said file wrapper and signed by said Frank E. Dellenbaugh, as such judge, and dated October 28th, 1895, and to the effect that said cause had been heard on said day by said Frank E. Dellenbaugh, as such judge, that the allegation of the petition had been found by the court to be true, and that the prayer of the petition had been granted and plaintiff had been restored to her maiden name, all of which was done wrongfully, corruptly and unprofessionally by the said Vernon H. Burke, as such attorney at law, and for the purpose the better to assist the said Frank E. Dellenbaugh to accomplish the purpose of his retainer and employment as attorney at law, for Edith Manning and to conceal the fact that the said Frank E. Dellenbaugh, while such judge, was the real attorney for Edith Manning in said matters.

The evidence under this specification shows that a short time before the 25th day of July, 1895, Judge Dellenbaugh said to Mr. Burke that Mrs. Manning desired to have a divorce, and that he should proceed at once to draw petition and that they talked over the nature and character of the petition, and the petition was drawn as set forth in the specification as there arranged between them. That they then talked over between themselves the importance of carrying out the arrangement with Jane Doe, that this entire matter should be kept private, and accordingly it was suggested by one or the other that some stranger should sign the petition, and accordingly the name of Webster was attached to the petitioner as attorney when it was drawn. The matter of keeping the petition and all reference to it

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on the books of the clerk of the court and of the sheriff in such a manner that nothing should appear thereon that would give any one any clue to this action of divorce, was talked over between them and arranged that Burke should procure the case to be so entered in the books. The petition was filed; nothing appeared upon the books in either office to show that any such action was pending, and the books continued so until after the divorce was granted, and until the time when the decree appeared in the court to be entered. A short time before Judge Dellenbaugh was about to leave the bench, he notified Mr. Burke that if the case was to be heard before he left the bench and heard before him, that he must hurry up and hear it. A very short time after that, Mrs. Manning informed Burke that the case had been set down for hearing on the 28th day of October, 1895. The evidence in the case shows, that Burke at this time, did not know that the case had been set down for hearing, that he had filed no motion to have it advanced, he had taken no steps in the matter looking to a trial of the case before Judge Dellenbaugh left the bench. On the 28th day of October, the day the case was set for trial, late in the afternoon of that day, Mrs. Manning and Miss Kent appeared in the court-room but Burke was not there. Burke was notified at his office to come to the court-room at once. He went; when he arrived there, he found Judge Dellenbaugh, Mrs. Manning and Miss Kent in the room. Judge Dellenbaugh at once repaired to his private room and asked the three persons present to go in there with him. After entering the private room, he entered upon the hearing of the divorce case. No persons were present but the four, Judge Dellenbaugh, Vernon H. Burke, Mrs. Manning and Miss Kent. Miss Kent and Mrs. Manning were sworn and testified. What they testified to before the court does not appear. Mr. Burke seems to fail in memory as to what they said in their testimony on that occasion.

It is hard to conceive how either of them could have testified to the claim of adultery set up in the petition, as the entire evidence in this matter from first to last shows conclusively that neither Mrs. Manning nor Miss Kent knew personally of any offense under this charge in the petition

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that Mr. Manning had committed. It clearly appears that in that trial all that the court did, was without any sufficient petition, and without any evidence that would warrant the court in granting the divorce. It was not then claimed and it is not now claimed that there was any truth whatever in the first and second allegations in the petition as to the neglect of George A. Manning. When the court was through, all that he did was to make an entry on the file wrapper as set forth in the specification. No other entry was made by the court. The evidence tends to show that the beginning and hearing of this divorce case was for two purposes. First, to procure a divorce for Mrs. Manning, and second, to procure it without anything being known by any one and without leaving trace that any one could follow to determine the fact that such a case was pending or that such a case had been tried and heard and a divorce granted. There could have been no other object or purpose in this great amount of secrecy and private trial and hiding of everything from the records, except to carry out the agreement that had been made with Jane Doe that nothing should occur in that divorce case that would in any manner reveal her identity.

Intimately connected with this second specification, is the third specification, which relates to the manner in which the journal entry in this divorce case was gotten upon the court records. It alleges and the proof shows that sometime after Judge Dellenbaugh left the bench in 1895, sometime in 1896, it was ascertained by Judge Dellenbaugh and Mr. Burke that no journal entry was on in the Manning divorce case. Judge Dellenbaugh called Mr. Burke's attention to this fact. Mr. Burke thereupon proceeded to draft a journal entry and took the same to the clerk of the court which was not O. K.'d by Judge Dellenbaugh, and asked the clerk to put it on record. The clerk told him he couldn't do that because it wasn't O. K.'d and sent him to Judge Logue to see what Judge Logue would do for him in the matter. Mr. Burke went to Judge Logue and Judge Logue told him that he didn't hear the case and he would not O. K. the journal entry. Thereupon Burke took the journal entry back to the clerk to do what he could to get the journal entry entered upon the journal of the court.



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The clerk took the journal entry and with Mrs. Manning went to see Judge Logue in regard to the matter, but Judge Logue refused to act in the matter and referred him to Judge Ong. Thereupon the clerk saw Judge Ong, and by this time it became rumored about, so that judges had some intimation that nothing appeared on the books of the court in any way that anyone had ever heard this divorce case, and it was known to the judges that there was nothing on the books in the clerk's office to show that any such case was pending. And Judge Ong with this information, told the clerk not to enter the journal entry of record. The clerk soon thereafter returned the journal entry to Mr. Burke and said to him that the judges would not permit the journal entry to go on unless it was O. K.'d by Judge Dellenbaugh before he left the bench.

Thereupon Mr. Burke notified Judge Dellenbaugh that he was unable to get the journal entry that he had, upon the journal, he had exhausted his resources, and although Mr. Burke can not remember all he said to Judge Dellenbaugh on that occasion, yet it does appear that Mr. Burke thereupon drew a new journal entry like the one he had tried to get upon the record, except that the new one contained an order of the court that Mrs. Manning be restored to her maiden name. This journal entry was handed by Mr. Burke to Judge Dellenbaugh. Soon after, this second draft of the journal entry was handed to Judge Dellenbaugh by Burke, Judge Dellenbaugh went to the clerk of the court and presented him a journal entry that corresponds in every word and particular and is a fac simile of the second journal entry that Mr. Burke drew as shown by the stenographer's minutes to whom Mr. Burke dictated the journal entry, and the court does not hesitate to find in this case that that journal entry presented to the clerk by Judge Dellenbaugh was the identical journal entry that Burke drew as the second entry, and the one that he drew after he failed to get his first draft on the records. When this journal entry was presented to the clerk by Judge Dellenbaugh, it had upon the face of it in red crayon "O. K. Dellenbaugh, Judge." After the clerk looked at the entry and saw that it was thus O. K.'d he said to Judge Dellenbaugh, "When did you O. K. this journal entry?" Judge Dellenbaugh

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said it was the day or the day after he had heard the case and before he left the bench. The clerk thereupon said: "Why, this obviates the entire objection that has been made to the journal entry going on in this case." And thereupon the clerk put the journal entry upon the record.

It appears in evidence further, that sometime in the fall of 1896, Judge Dellenbaugh was a candidate for the bench again, and was running for that place, and there was some talk got out in regard to this journal entry and it was then talked over and agreed between Dellenbaugh and Burke that if anything was said about the matter that they were to represent that the journal was done all right at the time of trial or very soon thereafter, and that Burke had sent the journal entry over to the clerk by a boy, who instead of leaving it with the entry clerk had left it with the file clerk and it had got in the files, and it had been thus mislaid.

It is now conceded that there were no facts to warrant the telling of any such story, but it is claimed by Judge Dissette that in the conversation he had with Burke just prior to the publication in the World in which Judge Dissette was asking him about this journal entry, and whether the Manning case had ever actually been tried or not, Mr. Burke then told Judge Dissette he had drawn the journal entry and sent it over by a boy and it had got into the files without being entered upon the records.

The effect of this testimony under the second and third specifications is this: that Mr. Burke knew that he had no petition in that case that would authorize any court to proceed to trial upon the same. He knew that he was proceeding before a court that had no authority whatever to try that case. He knew the court was prohibited by statute and by all authority of law, from trying a case with which he had so much to do before he went upon the bench. Burke knew—he must have known, that there was no evidence produced by any person present, that was competent to testify upon the matter of the adultery of George A. Manning. He knew when he got the journal entry or was seeking to get the journal entry in the record of the case, that if the real facts of the way in which the case was commenced, after a consultation between himself and the judge who tried the case as to what should be in the petition, that

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the petition should be so meager as to be entirely insufficient, and that the evidence was insufficient, that any judge, who became acquainted with these facts, and who then had charge of the records of the court and control over them, would refuse to allow that journal entry to go upon the records. And this all for the purpose and only conceivable purpose or carrying out, the arrangement that he made with Jane Doe at the time that he obtained the ten thousand dollars from her. He knew, when he handed the second draft to Judge Dellenbaugh, that it would be impossible to get that draft upon the record without its being made to appear to the clerk or the judges then upon the bench, that that journal entry was O. K.'d by Dellenbaugh when he was upon the bench. And this conspiracy between Judge Dellenbaugh and Mr. Burke as to the commencing of this action, as to the trying of it, and as to the getting the journal entry on in such a way that nothing should be known in regard to Jane Doe in connection with the entire matter, is sufficient to warrant us in holding that all that Judge Dellenbaugh did in O. K.-ing that journal entry, long after he had left the bench, and all that he said and did to the clerk to get it on record, was well known to Mr. Burke. It is the act of one conspirator in direct line of the purposes and intentions of both conspirators, to accomplish an end, and we think, is sufficient to enable us to say, that Mr. Burke was equally responsible with Judge Dellenbaugh in getting the journal entry on by false representations made to the clerk.

Had Mr. Burke bribed the judge to do for him all that Judge Dellenbaugh did in this divorce case to further his ends and purposes, no one would hesitate for a moment as to his guilt. Had he persuaded the judge by false representations or by untruthful statements to do what Judge Dellenbaugh did in that case, no one would doubt as to his guilt. How much less is his guilt if he co-operates and connives with a judge who is on the bench in a scheme that is intended to further the objects and purposes of both of them if he commences an action, goes to trial upon it, and procures the entry of the journal entry, as was done in this case?

We see no way under the evidence in this case, of looking

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In Re Dellenbaugh.

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upon this transaction, except as one intended and executed for the purposes of carrying out a private arrangement between the parties to the action and the party from whom they had obtained money. And in order to do this, they were willing to and did pervert, and use for this unlawful purpose the courts of the state of Ohio. To thus use the courts of the state, is certainly a wrong that should not and cannot be overlooked.

We find that Mr. Burke is guilty as set out in both charges of the complaint in this proceeding.

*John G. White, Alex. Hadden, A. T. Hills, Wm. B. Sanders, and E. J. Blandin, for Prosecution.*

*M. A. Foran, and Mr. Bailey, for Defendant, Burke.*

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## IN RE DELLENBAUGH.

LAUBIE, J.

I had not thought that it would be necessary for me to take any part in announcing our conclusions in these cases, but as my brother, Judge Caldwell, on account of his voice failing him somewhat, has just asked me to relieve him of the duty of disposing of the Dellenbaugh case, I have thought proper to do so.

The statute governing proceedings of this character, prescribes two punishments, either of which may be inflicted, where an attorney is found guilty of the charges preferred against him. One is disbarment absolute, and the other is suspension for a given period. And, in determining, of course, which of these punishments should be inflicted upon an attorney, the gravity and extent of the dereliction upon his part must be regarded. The court should take into account all matters in exoneration of the offense and of its gravity, on the one hand, and, on the other hand, should take into account all matters which form an aggravation as it were, of the conduct of the defendant; that is, those things which tend to show the gravity of the offense and the motive of the party in the performance of the criminal or unlawful act.

To that end, in undertaking to determine the punishment to be inflicted upon Mr. Dellenbaugh, we have had regard to all the circumstances of the case. We have been somewhat enlightened in this investigation through the trial of

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In Re Dellenbaugh.

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Mr. Burke, because the same matter precisely was involved in each trial. We have not been able to find anything in the circumstances of the case which, in any manner, tends to exonerate Mr. Dellenbaugh of the gravity of the offense of which we have found him guilty—nothing that has been shown to us, in the trial of either case, which in any manner exonerates him from the corrupt motive which is charged against him in the third specification of which he has been found guilty. On the other hand, many things have been developed by the testimony, which show conclusively to the court, the motive to have been deliberately corrupt, and therefore, to increase, as it were, the gravity of the offense of which he has been found guilty.

It may be remembered that my brother Hale, in delivering the opinion in this case, made the statement, that so far as the first charge against Judge Dellenbaugh was concerned, (which is the same as the first in the Burke case,) if the question could be determined upon the mere preponderance of the evidence, the court would undoubtedly have found him guilty.

We have many cases, where crime is directly charged against a defendant, not by criminal action, but by civil action by the party who claims to have been injured thereby, where a judgment awarding damages against defendant establishes the fact that he was guilty of a crime, and which would, therefore, have the tendency to disgrace him, and deprive him of his position in society almost as much as though he had been found guilty of the crime in a prosecution by the state, and yet in all these cases, almost universally, the issue is determined upon the preponderance of the evidence.

In this case, taking the gravity of it into consideration, and its other characteristics, we determined that it would be unjust to find Mr. Dellenbaugh guilty of the offense charged in the first specification, unless it were upon clear and convincing evidence—evidence that is so near to being beyond a reasonable doubt, that one can hardly distinguish between the two.

It was on one point in this first specification, and on one point only, that the court had this reasonable doubt, (and it gave the benefit of that doubt to Mr. Dellenbaugh), and

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In Re Dellenbaugh.

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that was whether or not he knowingly participated in the threats made to Jane Doe and in the promise to shield her from public disgrace, in order to obtain the ten thousand dollars. There was a conflict of evidence upon that proposition. To convict him of that, the case must have rested substantially upon the testimony alone of Mr. Burke. There was testimony which contradicted the statements of Mr. Burke, as to Dellenbaugh sending him to Jane Doe. Miss Kent, who Burke said was present when they were made, as well as Dellenbaugh, denied these statements. Christian, the detective, while his testimony tended to confirm them, told that he had made no reports whatever to Judge Dellenbaugh; that while he had been retained by him about the 22nd or 23rd of April, 1895, to investigate this matter, yet he had made no reports to Dellenbaugh, but that Burke had gotten the reports. And so it was that some doubt was thrown upon the proposition as to whether or not, Dellenbaugh had participated in that part of the transaction. But in determining the punishment to inflict upon Dellenbaugh, is he to be cleared entirely of the criminating circumstances shown in regard to that first specification? Clearly not. We could not take Mr. Burke's statements, especially against this contradictory evidence, and deduce therefrom that Dellenbaugh did participate in the unlawful method of obtaining this money. We could not use Burke's testimony on that point against Dellenbaugh, although we felt that substantially it was true. As against Burke himself we could deduce from the circumstances he detailed, what he must have said to Jane Doe, although he denied it. While he undertook to exonerate himself, yet the facts he detailed indelibly impressed upon the act all the characteristics of blackmail; no other explanation could be given of such a transaction. It was improbable that a woman, young and unmarried, should be approached as she was, and within a few hours compelled to disgorge ten thousand dollars, unless threats had been made against her to disgrace her; and subsequent transactions show, she would not have paid the money unless she had been guaranteed protection against exposure. While we could thus well find Burke guilty of this specification, notwithstanding his denial of the alleged

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In Re Dellenbaugh.

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threats and promises, we were doubtful as to Dellenbaugh, under the circumstances; so we gave to Mr. Dellenbaugh the benefit of the doubt. But as I have already said, the incriminating circumstances shown by the evidence as to the first charge, may well be taken into consideration against him, when we undertake to fix the penalty.

As to the second charge in regard to the divorce, it was stated by my coadjutor, Judge Hale, that we could not regard that specification of the charge, because it was substantially a charge against him of corrupt action as a judge.

While I have grave doubt as to the jurisdiction of the court to try Judge Dellenbaugh while he is upon the bench, yet we had nothing to do with that question in this trial, because it had already been determined by this court, on demurrer, that it did have jurisdiction; but we were unanimous in the opinion, that in regard to the second specification we had no jurisdiction; that whatever offense had been committed in granting the divorce, had been committed in his character and capacity as a judge, and that it devolved upon some other tribunal, in some other proceeding to call him to account for that. But, again, as reflecting upon the specification of which we did find him guilty, in developing incriminating circumstances showing the motive with which he acted, we had a perfect right to and we did look to the facts and to the circumstances developed in regard to such charge, upon the trial.

We were of the opinion, that it was beyond question that in the beginning Mr. Dellenbaugh was retained, not to bring suit for alination of the affections of the husband, but for a divorce. This lady, Mrs. Manning, had already left her husband; they had already separated; there was nothing staring her in the face but divorce; she was anxious for a divorce. The very fact that this decree had not been entered upon the record of the court, was developed through her anxiety to be re-married—this woman whose feelings had been so lacerated that they required twenty-five thousand dollars to soothe them (that being the amount she insisted Jane Doe should pay), was already looking for a second husband, and soon took one, and the necessity arose to show that she had been legally divorced, and that developed the fact that the decree had not been entered of record.

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Every thing points to the fact that Mrs. Manning retained Dellenbaugh only for the purpose of obtaining a divorce. Mr. Hickox, in whose family Mrs. Manning was then residing, testified that at her request he went and saw Mr. Dellenbaugh and asked him if he would act as her attorney in obtaining a divorce, and that at Dellenbaugh's request he brought her, and introduced her to Dellenbaugh, at the latter's office. It appears that afterwards he proceeded as her attorney in obtaining the evidence necessary to obtain a divorce for her on the sole ground upon which she declared she would accept it—the sole ground, because she was an Episcopalian—which was that her husband had committed adultery; and adultery with Jane Doe was to be the only ground for the divorce. So that, with that object in view, detectives were put upon the track of her husband and of this Jane Doe, that proof might be obtained of illicit intercourse between them; and it was found that he was with her night after night until early morning hours, and in a house of prostitution, as assignation houses are.

Now, with that situation of affairs, Judge Dellenbaugh directs the character of the petition for divorce that is to be filed, alleging adultery without naming the correspondent, and is cognizant of all the secrecy that is thrown around it according to the agreement with Jane Doe, who had paid ten thousand dollars to be relieved of the publicity. With all these facts staring him in the face, and the name of the case not appearing anywhere upon the records of the court, in the private room adjoining the court-room, in which Judge Dellenbaugh was then holding court as a judge, he, who had been attorney for the purpose of obtaining the divorce, he, who had received eleven hundred dollars growing out of the transaction as a fee, took cognizance of the case, and granted the divorce, as we must assume, upon the ground of adultery, when there was before him no person legally competent to tell of Manning's conduct—illicit conduct with Jane Doe.

Now, while upon the bench, he had neither seen, approved of, nor signed any decree; but after he retired from the bench Mr. Dellenbaugh not only O. K.'d a decree, but falsely represented that he had O. K.'d the decree while still a judge, and thus obtained what Burke was not able to do,



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a record of a decree to Mrs. Manning of a divorce, upon the ground that I have stated.

It seems now, that these matters are so closely interwoven and connected, each fact following the other so closely, that it is impossible to separate them. They show the motive in the misrepresentation to the clerk of the court, to be carried to the judges then upon the bench, and who had control of the records, that he had not only heard the case and granted the decree, but that he had O. K.'d the journal entry before he had left the bench. He had corruptly heard the divorce; he had corruptly granted it, if he granted it at all and I presume he did, and it follows as a necessary consequence that when he exerted himself as an attorney afterwards to get that decree entered of record, he was carrying out and giving force and effect to the corrupt motive that had animated him before.

These are the reasons why I have said that we know of no circumstance of exoneration in regard to the offense of which Mr. Dellenbaugh has been convicted; that all the circumstances are of a criminal nature and show conclusively the corrupt intent in all that he did; that this was unprofessional conduct, and could have proceeded only from a corrupt motive.

The result is: The judgment in the case against Dellenbaugh will be as in the Burke case, disbarment.

JUDGE CALDWELL: The entry will be drawn in this case showing the motion filed for a new trial on behalf of Burke.

MR. FORAN. Exception; and I wish to be heard in that case.

JUDGE CALDWELL: Yes, and do you want findings of fact?

MR. FORAN: Yes.

JUDGE CALDWELL: We will fix the compensation at \$100.00 for each member of the committee in the case, and provide for the stenographer—a large part of the work has been done by a stenographer—and I think the court will authorize her to be paid by the county.

The costs in the Dellenbaugh case will be paid by Dellenbaugh.

The costs in the Burke case will be paid by Burke, aside from those I have mentioned.

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Rote v. Warner et al.

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(Seventh Circuit—Lake Co., O., Circuit Court—Feb. Term, 1899.)

Before Frazier and Marvin, JJ.

(Judge Marvin of the Eighth Circuit sitting in place of Judge Burrows. Judge Lauble absent.)

MARJORIE WARNER ROTE v. EUGENE N. WARNER et al.

*Will contrued—Demonstrative legacy—*

- (1). A bequest of ten thousand dollars, payable as follows: twenty shares of the capital stock of the First National Bank of Painesville, Ohio, at \$2,000.00. One thousand dollars in Lake Shore & Michigan Southern Railway Company at par \$1,000.00. \$7,000.00 in money or good well secured notes—is a demonstrative legacy, and if the testator at his decease was not the owner of any Lake Shore & Michigan Southern bonds or stocks, the legacy does not abate, but is payable out of assets covered by the residuary bequest, as are general legacies.

*Legacies to executors in lieu of their statutory commissions—*

- (2). A testator, having by his will given his two sons, Eugene and Arthur, legacies largely in excess of what they would have received had he died intestate, directed "that in consideration of the legacies herein given to said sons that, no fees, commissions or charges for administering upon my estate shall be paid to them, or to either of them, except for actual expenses properly incurred." E. and A. administered the estate: Held they were not entitled to charge and receive the commissions authorized by sec. 6188, Revised Statutes of Ohio.

*Construction of will—Direct gift—*

- (3). The testator having, by his will, bequeathed to his wife in trust for M., his infant daughter, until she arrives at the age of majority, the sum of ten thousand dollars; by a codicil to his will, bequeathed to his said daughter M. "in addition to the sums provided for her in my said will, one thousand dollars in money:" Held, the one thousand dollars in money given by the codicil, is a direct gift to M., and not to his wife in trust for . until she arrives at the age of majority.

Appeal from the Court of Common Pleas of Lake county.  
FRAZIER, J.

This appeal is an action to construe the will and codicil

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of Elbridge O. Warner, deceased. The cause was heard in the court of common pleas and appealed to this court. In the court of common pleas the will was construed in several particulars, and the parties acquiesced in that construction in all but three provisions, which are the only questions which we are asked to construe or pass upon, and we do not refer to the other questions.

The first question arises under item fourth of the will. After the devise of real estate to Marjorie, the testator says:

"I do also give and bequeath to my wife in trust for my daughter, Marjorie O. Warner, until my daughter arrives at the age of majority, the sum of ten thousand dollars, payable as follows: Twenty shares of the capital stock of the First National Bank of Painesville, Ohio, at \$2000.00. One thousand dollars in Lake Shore & Michigan Southern Railway Company at par \$1000.00. \$7000.00 in money or in good well secured notes."

The question submitted under item fourth of the will is, whether the bequest of one thousand dollars in Lake Shore & Michigan Southern Railway Company at par is a specific legacy, so that if the decedent did not possess something answering that description the legacy fails, or whether it belongs to that class called "demonstrative legacies" which do not abate; but if the fund fail they rank with general legacies. The distinction between specific and general legacies is, that a specific legacy singles out the particular thing which the testator intends the donee to have, no regard being had to its value, while general legacies are payable out of the general assets, the chief element being the quantity, or its value.

There is a third class of legacies, known as demonstrative legacies, differing from general and partaking of the nature of specific legacies, in that they are not liable to abate. A demonstrative legacy is a pecuniary legacy, or legacy of quantity, the particular fund or personal property being

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pointed out from which it is to be taken or paid. If the fund pointed out for their payment fail, they are payable out of the general assets not specifically bequeathed, or out of funds covered by the residuary bequest with legacies general in their nature.

The bequest in this case is the sum of ten thousand dollars. The main or ruling idea of the testator is the amount, and if the testator, at the time of his death, did not own one thousand dollars in Lake Shore & Michigan Southern Railway Company (bonds or stocks),—something filling the description—the same will be fully satisfied by the payment of one thousand dollars out of the residuum by the executors, and this, we hold, to be the true construction of this item.

The second question presented to us is the proper construction of the seventh item of the will, which reads:

"I hereby appoint my sons, Eugene Warner and Arthur E. Warner, executors of this my last will and testament, hereby revoking all former wills by me made, and I direct that in consideration of the legacies herein given to said sons, that no fees, commissions or charges for administering upon my estate shall be paid to them, or to either of them, except for actual expenses properly incurred. I request the probate court not to require bonds of said executors."

Section 6188, Revised Statutes of Ohio, provides:

"Executors and administrators may be allowed the following commissions upon the amount of the personal estate collected and accounted for by them, and of the proceeds of real estate sold under an order of court for the payment of debts, or under directions of the will which shall be received in full compensation for all their ordinary services; that is to say:

"For the first thousand dollars, at the rate of six per centum;

"For all above that sum, and not exceeding five thousand dollars, at the rate of four per centum; and

"For all above five thousand dollars, at the rate of two per centum.

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"And in all cases, such further allowances shall be made as the court shall consider just and reasonable for actual and necessary expenses, and for extraordinary services, not required of an executor or administrator, in the common course of his duty; provided however, that when provision shall be made by the will of the deceased, for compensation to any executor, the same shall be deemed a full satisfaction for his services, in lieu of his aforesaid commissions or his share thereof, unless he shall, by an instrument filed in the court, renounce all claims to such compensation given by the will."

The executors claim and insist that they are entitled to charge and receive the commissions allowed executors, by sec. 6188 aforesaid.

That the will does not make provision for compensation to them in lieu of the commissions provided by statute and in satisfaction for their services as such executors.

The plaintiff, who, with the sons named as executors, is entitled to the residuum, claims and insists, that they are not entitled to the commissions allowed by statute. From the will, and the evidence submitted, it appears that the testator died leaving a widow, (his wife by a second marriage), the plaintiff, then an infant of tender years, issue of the second marriage, and the two sons named as executors, children by a former wife, to whom, had he died intestate, his estate would have descended. That the executors, Eugene N. Warner and Arthur E. Warner, by the legacies given in the will, received a much larger share of the estate of their father, Elbridge O. Warner, than they would have inherited had he died intestate.

At common law no compensation was allowed to executors and administrators, but, in most of the American states, compensation is allowed, and in most of them it is fixed by statute.

Woerner on the American Law of Administration, after citing the provisions in the statutes of the several states,

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says, in some of the states the statutes contain a provision, that when compensation is made by the will of the deceased for compensation to any executor, the same shall be deemed a full satisfaction for his services unless he shall in writing renounce all claims to the compensation given by the will; and in a note he states that the statutes of Ohio, New York, and other states named, contain such provisions. We have not the New York statute at hand, and hence cannot compare its provisions with ours. Nor have we been cited to any case in which our statute, or similar provisions in the statutes of another state, have received a construction.

Counsel for plaintiff refer us to the matter of Kernochan's will, 104 New York, 618. Neither in the statement of the case, arguments of counsel, nor opinion of the court, is a statute referred to; but, the last paragraph of the syllabus is:

"By the will Mrs. M was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee, other than his wife, 'do receive and take the full rate of commissions provided by law for each executor;' substantially the whole income of the estate was given to her. Held, that she was not entitled to commission as it was the intention of the testator to exclude her from compensation."

Danforth, Judge, in the opinion at page 631, reversing the action of the court below, says,

"The objection raised in behalf of the remainderman hangs upon the request of the testator contained in the will, in these words: 'It is also my request that all persons herein named as executors will consent to act as such executors and trustees, and that each executor and trustee, other than my wife, do also receive and take the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to duties herein devolved upon them.' We think the intention of the testator was to exclude his wife from compensation. Substantially the whole income of the estate, the result of the management of the executors, of

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whom she was one, is given to her, and it cannot be supposed that he intended she should also be paid for caring for it."

In the case at bar, the executors were large beneficiaries, receiving under the will much more than an equal share with the plaintiff, and a proper management of the estate was largely beneficial to them.

We are of opinion the provisions in the will in lieu of compensation, was intended by the testator to be in full compensation to the executors in lieu of the commissions allowed by statute, and that, by reason thereof, the executors are not entitled to charge and receive the commissions allowed by statute.

They knew, and were informed by the will, that the testator directed and provided by his will, that by reason of the legacies given them they should not receive the commissions allowed by statute, and after having voluntarily assumed the administration under the will, and received all the legacies therein given them, with a full knowledge of the provisions of the will and direction of the testator, and administered the estate, it being his will that in consideration of the provisions made for them in the will they should receive no compensation other than that which is provided in the clause itself, they would be estopped from claiming any compensation other than that which they are entitled to under the provisions of that clause of the will.

Hence, we think, that the proper construction of this item is, that the executors shall receive no compensation, except it be for actual expenses properly incurred in the administration, and such, we hold, to be the true construction of the will in this regard.

The third question submitted to us is as to the construction of that clause of the codicil, which reads:

"And do I also hereby give and bequeath to my said

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daughter Marjorie O. Warner, in addition to the sums provided for her in my said will, one thousand dollars in money."

The executors claim that the testator, by the bequest of one thousand dollars in money to his daughter Marjorie, in addition to the sums provided for her in his will, intended that it should go to his wife in trust for her, the same as the ten thousand dollars provided for her in the fourth item of his will. That by the phrase "in addition to the sums provided for her in my said will," he meant that it should be added to and become a part of the trust estate the same as if given by item four.

The plaintiff claims it to be a direct personal gift to her and not in trust, and is not payable to the trustee as such, but to her or her guardian.

The intention of the testator must be gathered from the words of the instrument. In the same sentence which he gives the thousand dollars in money he adds "and the piano I now own."

We cannot see how the one can be held to be in trust and the other a direct bequest, and I presume no one will claim that the piano became a part of the trust estate. He says:

"In addition to the sums provided for her in my said will."

In item four he devises to her, at the death of his wife, certain real estate, which he had, by item one of his will, given to his wife for life. He then gives to his wife, in trust for Marjorie, ten thousand dollars, and provides that if Marjorie die before arriving at eighteen years of age and coming into possession of said trust funds, the use shall go to his wife until her death and then revert to his heirs. He then directs that the increase use or profits derived from the trust funds, or so much as may be necessary, shall be used for the support and education of Marjorie during her



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minority, and in case of necessity her guardian may use, under the direction of the probate court for such purposes, so much of the principal as shall be deemed proper.

This latter provision was added, no doubt, by the testator in his solicitude to provide for his daughter of tender years, and recognizing the duty he owed to care for, educate and support her during her minority, and, in the course of time, when he made and executed the codicil, with the provisions of the will in his mind, and probably at that time with the will before him, he says: "In addition to the sums provided for her in my will I give her one thousand dollars in money and the piano I now own." Not "to my said wife in trust", as in item four; but the language is "I give and bequeath to my said daughter, Marjorie O. Warner, in addition to the sums provided for her in my said will, one thousand dollars in money and the piano I now own."

We are at a loss to see by what rule of construction the thousand dollars can be held to be in trust, and the piano and one third of the residuum given her by the same codicil, not also held to be in trust.

We hold, that the thousand dollars in money is a direct bequest to Marjorie, and payable to her or her guardian, and not to the trustee. And we further direct that the costs of this proceeding be paid by the executors out of the assets of the estate in their hands to be administered.

*Horace Alvord, William E. Cushing, and A.C. Pepon,*  
for Plaintiff.

*Geo. H. Shepherd, A. G. Reynolds, and George W.*  
*Alvord,* for Defendants.

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Rote v. Warner et al.

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(Seventh Circuit—Lake Co., O., Circuit Court—Feb. Term, 1899.)

Before Frazier and Marvin, JJ.

**MARJORIE WARNER ROTE v. EUGENE N. WARNER and ARTHUR E. WARNER, Executors of the last will and testament of Elbridge O. Warner, deceased.**

*Gift of bonds to infant daughter by handing same to her mother to keep for her—Gift complete—*

- (1). E. O. Warner, having a daughter Marjorie three years of age, and being the owner of two 7 per cent. coupon bonds of the L. S. & M. S. Ry. Co., each for \$500.00, endorsed upon each of said bonds the words "This bond I give and set over to my daughter Marjorie Warner this 20 December, 1878. E. O. Warner." From the date of such endorsement said bonds were in the keeping of Marjorie's mother until the death of E. O. Warner, which occurred in March, 1884. Held: sufficient to establish a completed gift of the bonds to the daughter.

*Will and codicil construed—*

- (2). A testator, by his will, bequeathed to a trustee the sum of ten thousand dollars, to be held in trust for an infant daughter of such testator until her majority, when it should be paid to such daughter, with provision as to its disposition in the event of the death of the daughter before attaining her majority, and in a codicil to such will he made a bequest to said daughter of the sum of one thousand dollars. The executors delivered to such trustee bonds of the value of \$1000.00, supposing at the time of such delivery that said bonds were a part of the testator's estate, whereas in fact they were already the property of the daughter, and paying to said trustee the further sum of \$10,000.00 under the mistaken belief that said trustee was the proper custodian of the \$1000.00 bequeathed by the codicil to the daughter. And the trustee having delivered said bonds to the daughter upon her attaining her majority, Held: that the executors had properly discharged the legacy made in the will, but that the legacy given by the codicil remained unpaid, and that said executors must pay to said daughter said sum of \$1000.00 bequeathed by said codicil, together with interest from a date one year later than the date of the testamentary letters issued to such executors.

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Error to the Court of Common Pleas of Lake county.

MARVIN J.

This is a proceeding in error seeking to reverse the judg-

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ment of the court of common pleas of this county, in a proceeding tried in that court upon appeal from the probate court.

The proceeding arose in the probate court upon exceptions filed by the plaintiff in error to the several accounts filed in the last named court by the defendants in error, as executors of the last will and testament of Elbridge O. Warner, deceased, who was the father of all the parties to this action.

The issues in the court of common pleas were tried to the court, the case being one not triable by a jury. After the decision was made in that court, and within the time provided by law, a motion for a new trial was filed, which was overruled by the court. A bill of exceptions, embodying all of the evidence in the case, was duly allowed and signed, a petition in error was duly filed, and we are called upon to determine whether any error was committed by the court of common pleas to the prejudice of this plaintiff in error entitling her to a reversal of the judgment.

On the —day of March, 1884, Elbridge O. Warner died testate. His will, which was duly admitted to probate, was executed on the 19th day of January, 1882, and the codicil to such will, which was also admitted to probate, was executed on the 21st day of January, 1884. A copy of this will and codicil constitutes a part of the evidence contained in this bill of exceptions, and, in another action brought for that purpose, this court has construed its provisions, so far as they relate to any matter pertaining to the questions involved here.

At the time of his death Warner left a widow, Marian E. Warner, who is the mother of the plaintiff in error, and he left three children, to-wit: the parties to this suit, the defendants in error not being the children of the widow already named. Bequests were made in the will to each of these members of his family. The plaintiff in error being

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named as Marjorie O. Warner, her present name of Rote being that of her husband, to whom she was married years after the death of her father.

The fourth item of the testator's will, so far as it refers to the controversy here, reads:

"I do also give and bequeath to my said wife, in trust for my said daughter Marjorie O. Warner until my said daughter arrives at maturity, the sum of ten thousand dollars, payable as follows: 20 shares of the capital stock of the First National Bank of Painesville, Ohio, \$2,000.00. One thousand dollars in Lake Shore & Michigan Southern Railway Company at par, \$1,000.00. Seven thousand dollars in money or in good well secured notes, \$7,000.00."

Aggregating ten thousand dollars.

In the case already referred to, we have just held at the present term that this is to be treated either as a demonstrative or a general bequest of ten thousand dollars, and that no one of the items specified, as being used to pay the same, constituted a specific legacy, and that if, at the time of the death of the testator, he was not the owner of all of these several items, then the item or items so wanting must be made good in money or its equivalent.

On the part of the plaintiff in error it is insisted that at the time the testator died he owned neither bonds, stocks or other property connected in any way with the Lake Shore & Michigan Southern Railway Company, which could have been intended by the second description of property named in this fourth item of the will.

The evidence establishes that if he did then own any such property, it consisted of two seven per cent. coupon bonds, issued by that company, each for five hundred dollars, and numbered respectively 312 and 393. It is certain that prior to December 20th, 1878, he did own these two bonds, and he still owned them when he died unless he parted with such ownership on the day last named.

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The court below held, under the evidence, that he did not part with such ownership, but that these bonds were a part of the estate left by him, and that the executors were entitled to the credit claimed by them for the delivery of these bonds to the trustee for the plaintiff in error.

Was there error in this holding?

At the time of his death these two bonds were in the testator's house, and each had endorsed on it, in pencil in the handwriting of the testator, these words:

"This bond I give and set over to my daughter Marjorie Warner this 20 December, 1878. E. O. Warner."

The plaintiff in error, at the date of this endorsement, was but three years old, and, of course, was wholly unable to act for herself in accepting or taking the custody or control of any such property for herself, if it should be given to her.

That her father intended that this property should at some time belong to Marjorie is conceded by the defendants in error; but, they say that such intention was carried out by the bequest in the foregoing part of the fourth item of his will, while, on the other hand, it is urged that he did, on the 20th of December, 1878, actually transfer the present ownership of these bonds to the daughter. If he desired and intended so to transfer the ownership, it is difficult to think of any words which he could have used to express such intention, either concisely or elaborately, more clearly than those already quoted and as we find written by him on each bond.

But, something more than intention, however clearly expressed, is necessary to constitute a gift of a chose in action, or of chattel property. There must be also a delivery of the thing donated.

Mr. Thornton, in his work on Gifts and Advancements, at paragraph 292, says:

"In all cases of a gift of a written chose in action, de-

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livery is as essential to the validity of the gift as the delivery of a chattel."

Our own supreme court, speaking by Judge Brinkerhoff, in the case of Hamor v. Moore's Adm'r, found in the 8 Ohio St. Reports, at page 242, uses this language:

"And to a valid gift inter vivos, delivery and acceptance, either actual, constructive, or symbolical, are everywhere held to be essential."

In the case of Phipps v. Hope 'Adm'r., et al., 16 Ohio St. Reports at page 586, the first paragraph of the syllabus reads:

"To constitute a valid gift, either inter vivos or causa mortis, a delivery, either actual, constructive, or symbolical, is essential."

See also Flanders v. Blandy, 45 Ohio St. Reports, at page 108, and the opinion on page 113, where this language is used:

"The donor must part not only with the possession, but with the dominion and control of the property."

Thornton on Gifts, at page 131 says:

"In all gifts a delivery of the thing given is essential to their validity, for, although every other step be taken that is essential to the validity of the gift, if it was not delivered the gift must fail. Intention cannot supply it. Words cannot supply it. Actions cannot supply it."

Without further citation of authorities on this point, we regard it as settled law that no gift of these bonds, was or could be perfected without a delivery of them by the donor; such a delivery as took from him the dominion and control of the bonds.

In paragraph 292, of Thornton on Gifts, from which a quotation has already been made in this opinion, this further language is used:

"And the same rules applicable to a delivery of a chattel, are applicable to a delivery of such chose in action".

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And again:

"The delivery may be to a third person for the donee."

In paragraph 129, at page 104, the same writer, under the caption "Definition of Delivery", says:

"The delivery of a chattel, in the instance of a gift, is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take the chattel when it is present, and in a situation to be taken by either party."

Judge Dickman, in his opinion in *Flanders v. Blandy*, *supra*, says:

"Gifts *inter vivos*, like gifts *causa mortis*, are watched with caution by the courts, and to support them clear and convicting evidence is required."

That case is familiar to the profession in Ohio, including counsel in this case. The court found that the bonds, which Blandy purchased as a gift for his daughter, were never delivered to her or to any other person for her. They remained in the keeping of the father until he sold them to obtain money to put into a business enterprise. True, while he held the bonds, he collected the interest and paid it to his daughter—he retained them in his possession at her request; but the court held that there was no delivery, constructive, or otherwise, of the bonds to the daughter, and it is in connection with the discussion of such a state of facts, that the language, quoted from the opinion, is used.

Thornton on Gifts, at paragraph 160, states clearly the proposition:

"That the delivery of the thing given may be made to a third person for the donee, and that if so made, under circumstances which indicate that the donor relinquishes all right to the possession and control of the thing given, with the intention to pass the present title in the donee, the gift will be sustained."

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And this is supported by numerous authorities cited in the notes under this section. As has already been said, words could not well have been used more effectually to declare that the bonds in question were, on the 20th of December, 1878, made the property of Marjorie O. Warner, than the words which were at that date written on each bond by Elbridge O. Warner, and if this intention, thus unequivocally expressed, was followed by such a delivery of possession, custody and control as satisfies the requirements of the law for supporting a gift, then these bonds became then and there the property of Marjorie, and constituted no part of the estate left by Elbridge O. Warner at his death.

The fact that Mr. Warner was a man of very considerable means; that Marjorie was his only daughter, and his youngest child; that he had already aided each of his sons, certainly renders it by no means improbable that he might make such a gift to his daughter, as she here claims he did make.

In the writing on the bonds he says he does make this gift. If he undertook to carry out this purpose by delivery of the property to whom would we expect him to make such delivery? The child could not be trusted with the manual possession of such property as this. The mother would seem to be the one who, above all others, it would be expected he would select as the custodian of the subject of the gift. Authorities are not wanting to the effect that in the case of an attempted gift by a parent to a child of such tender years as to be entirely unfit to have the custody of the subject of the gift, the retaining of such custody by the donor will not defeat the gift. See *Hillebrant v. Brewer*, 6 Tex., 24, and *Ector v. Welch*, 29 Ga., 443; surely then, the delivery by one parent to the other of property for their infant child, if accompanied by all the other elements necessary to constitute a valid gift, will be upheld as a valid gift.



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Without considering any evidence here, as to the competency of which there can be any question, we are satisfied that from the 20th of December, 1878, up to the time when Elbridge O. Warner died in 1884, these bonds were in the custody and control of Marion E. Warner for her daughter Marjorie, and that they were so placed in her custody by Mr. Warner at the date of the written transfer entered on the bonds.

It is said that it is improbable that she should have kept them, as she says she did, in the bureau drawer during all of these years, when, in the next room in the same house where she and her husband and their child lived, there was a good fire proof safe. And yet if she had placed them in this safe it might be urged with fully as much reason, that the fact of their being in the donor's safe was evidence that the gift was never perfected by delivery. Mrs. Warner says she kept other valuable papers in this drawer, and that she kept money there, and we do not think there is any such improbability in these statements as to justify us in disbelieving her.

The fact, that after the death of her husband, when the executors were preparing for an appraisement of the estate, she produced these bonds from her bureau, we think, is clearly established. She says so; Arthur Warner, one of the executors and a defendant here, says so, and Eugene, the other executor, says he does not remember that she did, and, in answer to one question, says she did not; but it seems clear to us that his memory in this regard is at fault. It is hardly possible that both Mrs. Warner and Arthur should remember this alike, if nothing of the kind ever occurred, and surely there can be no suspicion of collusion between these two witnesses—their interests, or rather the interests of Mrs. Warner's daughter and the interests of Arthur, are directly adverse to each other. It is much more probable that Eugene should be mistaken about this than

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that both of the others should be, and we think it altogether consistent, with the entire honesty of purpose of all these parties, that Eugene should be mistaken in this, and also as to the time when he saw these bonds in his father's safe. He undoubtedly did see them there after the safe was removed to his own house, and after the executors had taken possession of the bonds as a part of the estate. His recollection is that it was then that he first heard Mrs. Warner speak of their having been given to Marjorie. As already said, we think he is clearly mistaken as to his having then first heard this claim made by Mrs. Warner, and we think he is mistaken in saying, that after the 20th of December, 178, and before the death of his father, he saw them in the safe.

It is urged in argument that the conduct of Mrs. Warner in permitting these bonds to be taken by the executors without protest, was inconsistent with her claim now, that they were then the property of Marjorie, and especially that she should have made no claim to them during all the years that she was her daughter's guardian—something like nine years. We do not think so. She was not familiar, we may well presume, with legal principles, and she was informed by one of the executors that the probate judge had told him that these bonds were what was meant by the second description of property named in the fourth item of the will. If these bonds were in Mrs. Warner's possession at the time they were asked for by the executors, when they were preparing for the appraisement, as we find from the evidence they were, she either obtained them surreptitiously, or they were given into her keeping by her husband. If she obtained them surreptitiously, she did so with the dishonest purpose of making it appear that they were the property of her daughter, when, in fact, they were not, and we think her conduct thereafter is wholly inconsistent with such a hypothesis. It is hardly to be conceived that if she were

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endeavoring to make the claim for these bonds, on behalf of her daughter, dishonestly, that she should have so readily given them over to the executors and acquiesced in what she was told the probate judge said as to their constituting a part of the testator's estate. Rather we should look to see her persist in the fraudulent scheme which she had undertaken.

We hold, therefore, that the court below erred in finding that these bonds were a part of the testator's estate, and that the executors were entitled to charge them as a part of the ten thousand dollars bequeathed in trust for Marjorie in the fourth item of the will. But, if the executors are not to take credit for their delivery under the fourth item of the will to Margorie's trustee, neither are they to be charged with them as a part of the estate. As the accounts were made up they are charged with them as a part of the estate, and credited with them as having been delivered to the trustee. It is manifest that so far as the item of the bonds is concerned, as between the executors and the estate, the result will be the same if you charge them with the bonds and credit them with paying them over to the trustee, or leave them out entirely of the accounts as should have been done, as we hold they were no part of the estate whatever.

Another error is claimed in the judgment of the court below, in allowing the executors credit for one thousand dollars paid to the trustee, ostensibly under the provision of that portion of the codicil which reads:

"And I do also hereby give and bequeath to my said daughter, Marjorie O. Warner, in addition to the sums provided for her in my said will, one thousand dollars in money and the piano I now own."

In the case already referred to between these same parties for the construction of this will and codicil, this court, at the present term, has held that the property mentioned in the clause just quoted, does not constitute an addition to the

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trust fund provided for in the fourth item of the will, but constitutes a direct legacy to Marjorie, to be paid and delivered directly to her or her guardian.

The fourth item provides that the mother of Marjorie shall be the trustee, to hold the property therein bequeathed during Marjories' minority. This trust Mrs. Warner declined to accept, and one Asa S. Stratton was duly appointed by the probate court as such trustee. He qualified, and payment was made by the executors to him in his said trust capacity.

Under our construction of item fourth of the will, as hereinbefore stated, there should have been delivered to this trustee the shares of bank stock named therein, and money or other property sufficient to make up the sum of ten thousand dollars, and, as we hold that the bonds were not a part of the testator's estate, but were already the property of Marjorie, it follows that they cannot constitute a part of the said sum, but that, exclusive of said bonds, said full sum of ten thousand dollars should have been paid to him. The accounts and vouchers show that this was done. The executors claim credit for eleven thousand dollars delivered to this trustee, and this under their mistake in supposing that the bequest named in the codicil was to be treated as an addition to the trust estate named in item four, thus making the trustee entitled to eleven thousand dollars, and the further mistake that the bonds were to be treated as a part of the bequest of ten thousand dollars. The bonds should never have been delivered to the trustee. The mother, though declining the trusteeship, was appointed and qualified as guardian of Marjorie, and she should have held these bonds as such guardian; but, no harm has come to Marjorie by their having been placed in the hands of Stratton. She has had all the interest accruing upon them, and when she reached her majority the bonds were delivered to her. So far then as her interests

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are concerned, it is matter of indifference in whose custody the bonds were kept during her minority.

Under item fourth of the will, as has already been said, without any reference to these bonds, ten thousand dollars should have been turned over by the executors to the trustee. That sum was turned over by them to him, and since he received the right amount, it is wholly indifferent that both he and the executors supposed he was getting but nine thousand dollars under item four, and that the remaining one thousand dollars was paid to him under the codicil. He should have received in all, as this trust fund, ten thousand dollars. He did receive that amount, and there was no error in holding that the executors were entitled to credit for paying it to him; but, there was and is error in the record and judgment of the court below, in holding that one thousand dollars of the sum paid said trustee was in payment of the one thousand dollars bequeathed to said Marjorie by the codicil. The court should have held, as hereinbefore indicated, that though the right amount had been paid to said trustee, such payment only satisfied the bequest in the fourth item of the will, and that the one thousand dollars bequeathed by said codicil, and which should have been paid to her guardian, has never been paid to anyone, and is still due from the executors to Marjorie, together with interest computed from a day one year after the letters testamentary were issued. For authorities as to the time from which interest is to be paid, see citations in *Case School, etc., v. Gray et al.*, 15 Circuit Court Reports, 492, and *Wheeler v. Hathaway et al.*, 54 Mich., 547.

It will be seen that, under this decision so far as questions are made before us, the executors' accounts require correction, in addition to such corrections as were ordered to be made by the court of common pleas, to the extent of making payment to the plaintiff in error of this bequest of one thousand dollars, with interest, made in the codicil,

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thus reducing the amount to be distributed under the residuary clause by that sum. As to the one thousand dollars which the executors permitted the widow to hold as a gift to her, without reviewing the evidence, we hold that there was no error in the judgment of the court of common pleas. That one thousand dollars was properly paid to the widow, or, rather, properly treated as having belonged to her before her husband's death.

The residuary clause of this codicil, so far as attention need be called to it here, reads:

"The surplus shall be divided equally between my sons Eugene N. Warner and Arthur E. Warner, and my daughter Marjorie O. Warner."

The practical operation, therefore, of our holding, will result in the paying by the executors of two-thirds of the amount now due on this bequest of one thousand dollars, and taking no credit therefor, or, paying the entire amount to Marjorie and taking credit therefor, and so divide as a residuum that much less. The amount which each will receive in either case will be the same. That is to say, if they pay to Marjorie the one thousand dollars, with the interest on it, and deduct it, and after such deduction determine the residuum and divide that residuum by three, giving to Marjorie one-third and taking each for himself one-third, or, if they simply hand over to Marjorie, without taking any credit for it, two-thirds of that one thousand dollars, with its interest, the result will be exactly the same.

We have before us all of the evidence upon which the court of common pleas acted, and, finding as we do that this judgment should be in part reversed, and having authority, under Revised Statutes, sec. 6726, to render the judgment which that court should have rendered, we here render judgment correcting the judgment of the court below, as indicated in this opinion, and remand the case to

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that court to carry such judgment into execution, the same as though this judgment had been entered in that court.

Being persuaded, as we are by the examination of this record, that the executors, the guardian, Marion E. Warner, and the plaintiff in error, have all acted in this matter in good faith, and allowing for that frailty in human nature which generally causes each to give himself the benefit of every doubt, that all have acted honestly, we deem it just, and therefore order, that the costs of this proceeding be paid by the executors out of the estate of the testator.

*Horace Alvord, William E. Cushing and A. C. Pepoon,*  
for Plaintiff in Error.

*Geo. H. Shepherd, A. G. Reynolds and George W. Alvord,*  
for Defendant in Error.

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(Sixth Circuit—Ottawa Co., O., Circuit Court—June Term, 1897.)

Before King, Haynes and Price, JJ.

[Judge Price of the Third Circuit, taking the place of Judge Parker.]

BOARD OF COUNTY COMMISSIONERS OF WOOD COUNTY  
v. BOARD OF COUNTY COMMISSIONERS OF OTTAWA  
COUNTY.

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*Ditch running into lower county—Compensation from upper to lower county—Power of probate judge to increase or diminish award made by committee—*

- (1). Under the statute, 86 O. L., 123, as amended 90 O. L., 81, and 91 O. L., 261, on exceptions to the report and award of compensation made by the committee appointed by the probate courts of the two counties to be paid by the upper to the lower county, the probate judge has the power upon the evidence to increase or diminish the compensation awarded by the committee, or to set aside the award and appoint a new committee to report.

*Same—Increased flow of water by public as well as private drainage to be considered—*

- (2). The statute which authorizes the assessment for increased

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expense in making an outlet, while it does not apply to the expense which will be necessary to take the natural flow of water, does apply to any increase that may be made on either public or private account. If it is created in the interest of better drainage, whether it be public ditches or private drains, if the increase comes on account of the artificial drainage, it is that which the lower county is required to take care of, and it is that for which they may require the upper county to contribute the expense.

*Evidence—Hypothetical questions—*

(3). A hypothetical question must be based upon facts assumed to have been proved in the case.

(Affirmed by Supreme Court without report. 39 W. L. B., 182; 58 Ohio St., 690. See also Commissioners Fulton Co. v. Commissioners Lucas Co. 12 C. C., 563.)

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KING, J.

This proceeding was a case brought before the probate judge of Ottawa county, Ohio, about the 24th of May, 1894, under the statute which is found in 86 O. L., 123, and as amended in 90 O. L., 81, and in 91 O. L., 261, which provides for the appointment by the probate judges of the counties interested of a joint committee of freeholders to consist of two appointed by the probate judge of each county, who shall be non-residents of and not owning lands in either county affected by the ditch. The committee in this case qualified and went out and examined the territory and ditch, or the proposed ditch, and its location, and before them the plan, profile and specifications as prepared by the engineer employed by this county to do the work, and made a report to the probate judge, finding that Wood county should pay to Ottawa county, \$4,000.

Some further hearing was at that time, had and proceedings in error were prosecuted to the court of common pleas, and from that court to this, and the proceedings before the probate judge were reversed by this court at a preceding trial, and the case sent back for further hearing before the probate judge, and it came on for that hearing and wit-



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nesses were called and evidence heard by the probate court who modified the report of the committee and increased the amount named from \$4,000 to \$10,000, as the sum to be paid by Wood county.

The proceeding in error was brought to this court, Judge Price sitting in the case, Judge Parker being interested in the case before it was heard here, and we have carefully gone over the record and examined the arguments of counsel, and have come to the conclusion which I will announce.

In the first place, it is claimed that the probate court had no power under the statute to increase the amount contained in the report of this committee of freeholders. This court has passed upon that question in the case of *The Commissioners of Fulton Co. v. Commissioners of Lucas Co.*, reported in 12 C. C., 563, and a further consideration of it by the court only leads us to the conclusion that we were right in that decision, and, therefore, it will not be necessary for me to discuss the questions decided in that case. We held under the provisions of the statute that the power given to the probate judge to modify this judgment gives him power upon the evidence to increase or to diminish the amount of it, and that, therefore, it was within his authority, if he saw fit to hear evidence at that time, and consider it, as it was within his power under the statute to set aside the report and send out a new committee to report.

It is further claimed that there were errors occurring at this trial in the admission of evidence, and that the amount fixed by the probate judge is not sustained by the evidence, or is against the weight of the evidence.

The principal objection to the testimony is that made to the evidence of C. A. Judson. It is claimed that questions put to him were not proper questions. Mr. Judson was an engineer of fifteen years' experience, living in an adjoining county, and after the first hearing by the probate judge upon this report, which, as I have said, was subsequently re-

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versed by this court while the case was pending on error, the probate judge appointed a second committee, and Mr. Judson was made a member of that committee, being a citizen of Erie county, and in that capacity he went along the line of the ditch and examined the territory through which it ran, and also went along some distance through the territory in Wood county which would drain into the proposed ditch to be constructed in Ottawa county.

In addition to that, at the time of the trial he had examined the plans and specifications prepared by the engineer selected by Ottawa county, and with this qualification he was asked to state various matters leading up to the conclusion to be arrived at, to-wit, the cost of constructing an outlet in Ottawa county which would be sufficient to conduct the waters of Wood county that would flow into it by reason of the increased artificial drainage provided in Wood county by its public or private ditches. The statute which authorizes the assessment for increased expense in making an outlet, while it does not apply to the expense which will be necessary to take the natural flow of water, does apply to any increase that may be made on either public or private account. If it is created in the interest of better drainage, whether it be by public ditches or private drains, if the increase comes on account of the artificial drainage, it is that which the lower county is required to take care of, and it is that for which they may require the upper county to contribute the expense.

Now Mr. Judson was asked to state what this ditch would cost, the improvements that were necessary to make it a sufficient outlet, based upon his examination of the profiles prepared by the engineer, and based upon the knowledge he had derived from an actual investigation of the ground itself, and from the general knowledge that he had of engineering under like circumstances and conditions. Now it is true that not all of these elements were raised in

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a single question, but we find them all here stated in different forms. A hypothetical question must be based upon facts assumed to have been proved in that case.

The engineer who prepared these specifications was called to testify and did testify as to their accuracy, and his judgment was to an extent also clearly a matter of opinion; so we think all questions asked of Judson were proper, and the opinion called for from him was one that might be asked of such a witness, based upon such facts as were placed before him or which he had acquired in any manner, and there was no error in the admission of that class of testimony.

The second question is whether the judgment is supported by the evidence. That is a very difficult question for us to answer from the record, but we have to apply to it the same rule we would apply in other cases; and that is, whether there is satisfactory evidence upon which the finding of the court may be sustained. If there is not, it must be reversed or reduced; but if there is, it must be sustained.

I will not go over the evidence in this case very fully, for we find from the record here is evidence, and competent evidence, from which the court might conclude that the flow of water in Ottawa county occasioned by the artificial drainage in Wood county had been more than doubled. By that we do not mean that the total quantity of water from Wood county was twice what it was before the construction of those improvements: but it came down so much faster that it was more than double at certain times and places, and for a period of time the amount of water added was more than twice the amount it was before those improvements were made. There is abundance of evidence in the record to substantiate a finding of that character.

It appears from some of the evidence in the case that there are ten thousand acres in Ottawa county which would be drained by this improvement, and that there are about eight thousand acres in Wood county which are tributary

to the ditch which leads into this. In other words, the water to be added by this outlet stands in about the proportion of four-ninths coming from Wood county, to three-ninths coming from Ottawa county. Now the estimate for the improvement is more than \$49,000.00, a very large sum of money, but no attempt is made to say it is excessive except perhaps with reference to matters which I will notice later.

No attempt was made to prove that it was not necessary to construct a ditch, at least of the length which is proposed to be constructed here, for the distance from the county line to the body of water into which it is drained is not disputed. And the only dispute is as to the dimensions of the ditch necessary for an outlet for the water from Wood county. The total cost is estimated at more than \$49,000.00. If four-ninths of that is necessary to accommodate the water from Wood county, and if the water from Wood county has been doubled by artificial drainage, the proportion which Wood county should pay is four-eighteenths of that cost substantially, and that is a sum considerably more than \$10,000.00, the amount found by the probate judge; it is \$11,000.00.

Mr. Judson says in his testimony that the cost of constructing the outlet for this water caused by the increased drainage from Wood county alone, would be, according to the best estimate he has been able to make, \$14,526.00.

Mr. Hughes, the engineer employed by this county, makes it a very much larger sum than that.

Mr. Spafford, who was the engineer for Wood county and is a witness called by them, makes the amount considerably less. In fact, Mr. Spafford says that there is no additional amount of water created by the improvements that they have made in Wood county; but I think that the evidence shows, his as well as the rest, that he must be mistaken. It is barely possible he may be a little biased giv-

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ing that kind of an opinion; and he closes his testimony by saying \$4,000.00 would be ample for providing for the increased water caused by the improvement in Wood county; but there is a very wide difference between saying \$4,000.00 would be necessary, and saying that nothing is necessary.

I think Mr. Spafford is also mistaken in view of the testimony of the other engineers, as to the amount of the capacity required in this outlet ditch. In the first place, he testifies that there is no increase of water, and that no increase of ditch is necessary. Then he figures out an estimate very much less than the estimate of the Ottawa county engineers, but Mr. Judson, who is entirely impartial so far as we are able to discover, and from our own knowledge we know he is as competent as any witness that might be called on that subject to testify about it, and he testifies to the amount of material that would be necessary to remove there, and the cost of it, putting the cost and expense quite a little lower than Mr. Hughes, and yet he says it would be necessary to expend at least \$14,000.00 in order to take care of the water that would come into Ottawa county.

Of course, there are many difficulties in arriving at this, but the committee in the first instance are not infallible. They are like a board of arbitrators; they are sent out and advised by the court, and after having heard their opinion supplemented by the engineer who would know better than any one of the committee who was not an engineer, the court would be in a better position to determine the amount that should be paid.

It is said that the probate judge in one county would be interested in his county. We have to leave these questions to somebody, to some tribunal, and the legislature has left it to the probate judge where the proceedings are instituted. They might be instituted in Wood county, and then the probate judge of Wood county would have the decision of

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them. The legislature has reposed this in the probate judge, and we have to look upon his judgment the same as that of any other court, and see if it is supported by sufficient evidence, and we think there is sufficient evidence in this case to sustain the finding of the probate judge, that Wood county should pay \$10,000.00, and for that reason the judgment will be affirmed.

*Parker & Fries and E. G. Love, for Plaintiff in Error.*

*Wm. Gordon and C. I. York, for Defendant in Error.*

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(Third Circuit—Crawford Co., O., Circuit Court—Jan. Term, 1899.)

Before Day, Price and Norris, JJ.

THE STATE OF OHIO ex rel. LEONARD & STRATTON v. THE COMMISSIONERS OF CRAWFORD COUNTY.

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*Addition to Public Building—What will amount to—Steam heating plant—Sec. 795 R. S. controls—*

(1). When the necessary machinery, pipes, radiators and appliances, constituting a steam heating plant, is erected in a public building and is so securely fastened to and connected with the building, as, when completed, to form part of it, such steam heating plant is "an addition to such building," within the meaning of sec. 795, Rev. Stat., and the construction of such plant, by the county commissioners, is governed and controlled by the provisions of that section.

*Same—Sec. 795 Rev. Stat. mandatory—*

(2). While the commissioners of a county are by law clothed with full power to construct, or cause to be constructed, all necessary public buildings and additions thereto, and to let contracts therefor; yet they may not make a contract for the erection of any such building, until they have first fully performed the provisions and requirements of sec. 795, Rev. Stat., in making accurate plans, definite specifications and bills, description of materials, etc., etc., and estimates of cost and expense of such building or addition. The requirements of said section are mandatory, and their strict performance are conditions precedent to the exercise of the power.

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*Mandamus to compel contract to lowest bidder—*

- (3). When all the requirements of said section have been performed fully, and advertisement for proposals duly made and proposals submitted for the construction of such building in accordance with the plans and specifications, so that nothing remains to be done but to ascertain the lowest bidder, it becomes the legal duty of the commissioners to award the contract to such lowest bidder; and mandamus lies to compel such award. Until said requirements are so complied with, it is not an official duty to either advertise for proposals or award contract, and the awarding of a contract cannot be compelled by mandamus.

*Same—*

- (4). In such proceeding the commissioners should not, and cannot be required to, award a contract to the lowest bidder, until a good and sufficient bond, properly conditioned, is first given.

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Appeal from the Court of Common Pleas of Crawford county.

DAY, J.

This is a proceeding in mandamus, and its object and purpose is, by the mandatory order of the court to require the commissioners of the county to award and let to the relators a contract for constructing a steam heating plant in the court-house and jail, on the ground and for the reason that they are the lowest and best bidders therefor.

The substance of the complaint is, that respondents, having determined to erect a system of steam heating for the court-house and jail, caused plans and specifications for the improvement to be made, which were duly approved by them, and upon which, by published advertisement, they solicited proposals to supply the necessary material and labor to fully construct and complete such system of steam heating; that, in pursuance to such request, relators prepared and submitted a proposal, as did other parties, including a Mr. Halley; that relators proposal was \$163.00 less in amount than that of any other bidder; yet that respondents awarded the contract to said Halley, at a price in

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excess, to the extent of said \$163.00, of the proposal of relators. A peremptory writ of mandamus is prayed for.

The board of commissioners, by an answer, take issue with the material averments of the complaint; deny that relators were the lowest and best bidders, and that they are entitled to have the contract awarded to them; assert that all the bids were rejected, and that no contract was awarded to any one under the advertisement for proposals; and that the said board of commissioners have purchased the necessary material and employed the necessary labor and have caused the said plant to be constructed and fully completed and have had it in successful operation for a long time; and having fully answered respondents ask to go hence and recover costs. By reply the relators insist that the final rejection of Halley's proposal, and the construction of the plant under the direction of the commissioners, was only colorable and not in good faith, and pray as in their complaint.

The case was heard and submitted on the evidence from a consideration of which the court finds and states the following as undisputed facts: The respondents are the duly qualified and acting commissioners of Crawford county; they found it necessary and determined to build a power house and put in a steam-heating plant for the court-house and jail of said county, and for that purpose procured a plan and specifications to be prepared, which were approved, and public advertisement made, inviting proposals to supply the necessary materials and labor and construct the said power house and heating plant, in accordance with said plan and specifications. The advertisement requested each bidder to specify with particularity, in the proposal submitted, the precise kind and quality and the exact amount of material to be used in the construction of said plant. The plan and specifications did not contain a definite description of the kind, quality and amount of materials to be used, nor were they accompanied



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by an accurate bill showing the exact amount of all the different kinds of materials to be used in the construction of the plant, nor by a full and complete estimate of each item of expense, and the entire aggregate cost, of the plant. A large number of proposals were prepared and submitted to the board in pursuance of the advertisement. Upon examination of the several bids, the bid of relators was found to be the lowest, in the sum of \$163.00, and that of—Halley the next lowest. The proposal of relators did not specify the precise kinds and amount of materials it was proposed to use. Halley's proposal was more definite in that respect. The board of commissioners rejected the bid of relators, and accepted that of Halley. The relators did not give, or tender, a proper bond, conditioned for the faithful performance and completion of the contract if awarded to them, but they were able and willing to give such bond, if demanded. After the lapse of about ninety days, the board, with the consent of Halley, rejected his bid also, and proceeded, in good faith, and constructed the steam heating plant, under its own direction and supervision, and has fully completed the same.

By express provision of statute, mandamus will not issue to control judicial or official discretion, but only to "require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions," by "commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Sections 6741-6742, Revised Statutes. So, that to entitle relators to the relief they seek a mandatory order on the respondents, to accept relator's proposal and award them the contract for constructing the steam heating plant, it is necessary that the facts appearing establish such a situation or condition that it becomes the clear official duty, on the part of the board of county commissioners, to let the contract to the relators, at their proposal. Stating it differently, such

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situation and condition must be established by the evidence, that the law, acting thereon, makes it the legal duty of the board to award the contract to the relators; and if the facts appearing show no such legal duty, but on the contrary, shows a legal duty to not award the contract to the relators, or to any one, then relators have mistaken their remedy, and must suffer non-suit. Otherwise if a legal duty is made manifest by competent evidence. The claim is asserted that under the provisions of sections 795, 797 and 798, Revised Statutes, and the facts as they are proven, it became the plain duty of the respondents, as a board of commissioners, to award the contract for supplying the necessary materials and constructing the proposed steam heating plant to the relators. These sections do authorize the making of plans and specifications, and estimates of cost and expense of constructing public buildings, additions to buildings, etc., the advertising for proposals and the letting of contracts for the construction of the same; and define the powers and duties of the commissioners touching such matters, and are relied on by relators as constituting and fixing a definite condition, entitling them to the relief they are demanding.

The provisions of section 795, Revised Statutes, so far as they relate to and have bearing on the proposition before the court, are as follows:

"In all cases where it becomes necessary for the commissioners of any county to erect or cause to be erected any public building, \* \* \* or where it is necessary to make any addition or alteration of the same, whether the same is done under a general or special law passed for that purpose, such commissioners, before entering into any contract for the erection, alteration or repair thereof, or for the supply of any materials therefor, shall make, or may procure some competent architect or civil engineer to make full, complete and accurate plans therefor, showing all the necessary details of the work and

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materials that will be required for the same, together with working plans suitable for the use of the mechanics or other builders during the constructing thereof, so drawn as to be easily understood; and also accurate bills, showing the exact amount of all the different kinds of materials to be used in the erection thereof, addition thereto, or in the alteration of the same, and they shall accompany the plan or plans. The architect or civil engineer shall also furnish complete specifications of the work to be done, showing the manner and style in which the same will be required to be done, and giving such directions for the same as will enable any competent builder to carry them out; afford to bidders all needful information to enable them to understand what will be required in the construction \* \* \* thereof; he shall also make a full, accurate and complete estimate of each item of expense, and the entire aggregate-cost of the building \* \* \* or of any addition to \* \* \* when completed."

Counsel for respondents urges that this particular contract for the erection of a steam heating plant, is not included or covered by the provisions of the section just quoted, as not being a building, an addition or an alteration of a building, and therefore, there is no requirement that the contract for its construction be let at public or competitive bidding. The suggestion is not warranted by the facts, and is wholly untenable, as a legal proposition. The steam heating plant is of such character, and is attached to the building in such manner and for such purpose, that it becomes a part of it, and so is included and referred to in the section as, "an addition to a building," and the letting of a contract for its construction is governed by the provisions of the section.

Certainly the power to make contracts for, and to secure the construction of public buildings, and make alterations and additions thereto, is, by the provisions of law, vested in the commissioners of a county; and equally certain is it that a definite limitation, or rather condition precedent to the exercise of that power, has been imposed by the provis-

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ions of section 795, Revised Statutes, just above quoted. "Before entering into any contract for the erection" of any building,—says the section, "the commissioners shall make, or cause to be made, full, complete and accurate plans therefor, showing all necessary detail of the work and materials that will be required for the same"; and working plans for the use of the mechanic, so drawn as to be easily understood; "and also accurate bills, showing the exact amount of all the different kinds of materials to be used; and these plans and bills must accompany the plans; and there must also be made full, accurate and complete estimates of each item of expense, and the entire aggregate cost", of the structure to be erected. These requirements are imperative, and necessary to be observed before the commissioners can let a contract, or properly advertise for proposals for a contract. They are also wise and beneficent, and serve the double purpose of compelling the officers to exercise their judgments, not only as to the general plans and specifications of the structure, but as to all the matters of detail, such as the quality, quantity and style of materials, and the estimated cost and expense of each item, and the aggregate cost of the whole; and affords needed protection to the public, and as well to honest contractors and builders. So we say, the making of plans and specifications, accurate bills showing precisely the different kinds and the exact amount of materials required, estimates of cost and expense of the items and in the aggregate, all settled and approved by the exercise of the judgment of the commissioners acting as a board, are conditions precedent to the exercise of the power to erect public buildings and additions thereto, or to advertise and let contracts for the erection thereof. Until the board does and performs all the requirements of the section it is without authority to act, and destitute of power to advertise for proposals or to let a contract.

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The evidence heard upon the trial and bearing upon the, as we conceive, controlling question in the case, is practically without conflict, and is all to the effect, that while possibly a sufficient general plan was made, or caused to be made by the commissioners, there was very little definite specification—certainly not such definite and clear specifications, showing all the necessary details of the work and materials required for the work, as the section contemplates. There was absolutely no bill or bills showing the "exact amount of all the different kinds of materials to be used in the construction" of the plant, and there was no estimate of the cost and expense, either of the items or in the aggregate. These omissions and defects in definite specifications and estimates, the board of commissioners undertook to cure and supply, by requiring bidders to make and file with their proposals, accurate specifications and bills of materials, with the estimated cost thereof, as required by the statute. This would have been proper under the provisions of section 796, Revised Statutes, as such action is therein provided for. But that section has special reference to the letting of contracts for bridges and bridge work, and is not believed to apply in the matter of letting contracts for buildings, or additions to buildings, provided for in section 795, and if it had application, the fact would not be helpful to relators, for they omitted to make and file with their proposal, the required definite descriptive bills of material and estimates of cost and expense of the various items.

In any event and at all times, when the board of commissioners have found it necessary to erect a public building, the board is required to exercise a sound discretion in determining the character and extent of the building, in making or causing to be made, plans for its construction, and in selecting the materials of which it is to be constructed. The board must exercise its judgment in all these respects. This is imperative, and may not be omitted. When that is

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done, and is put in permanent and definite form, such as by accurate plans, specifications and descriptive bills of materials, giving the precise amount, quality and kind of material required, with an estimate of the cost; with nothing indefinite or uncertain, but altogether definite and certain as provided by the law, the board has exercised its discretion—the discretion lodged in it by the law, so that nothing remains but to ascertain the lowest bidder and award the contract. In such case it becomes the legal duty of the board to award the contract to the lowest bidder, and mandamus will lie to compel the discharge of such legal duty. But until the discretion has been exercised and the decision put in proper form by definite plans and bills describing the precise kind, quality and amount of material, as required by section 795, Revised Statutes, it still remains a matter of discretion with the board, and its exercise cannot be directed or controlled by mandamus.

There is another reason why the relief sought by relators in this case should not be allowed. The requirement of the law is, that before a contract can properly be awarded to a bidder, such bidder must first give a good and sufficient bond, conditioned for the faithful and proper performance of the contract if awarded, etc. This also would seem to be a condition precedent to the awarding of the contract, especially if the board so requires. The offer of a bond, properly conditioned and with proper sureties, should accompany the proposal, as an earnest of good faith and to entitle the bid to consideration. The relators in this case, did not give or tender such a bond, and so have not put themselves in such position that it becomes the legal duty of the board to award them the contract on their proposal.

From any view we are able to take of the case, on the law and facts appearing, we do not find a situation or condition established by the evidence submitted, that makes it the official duty of the board of commissioners, respondents in

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this case, to give the contract for furnishing the labor and material for the construction of a steam heating plant in the Crawford county court-house and jail to the relators. In our opinion the board very properly rejected all the proposals submitted, including that of relators, and its conduct is commended as entirely proper and in accordance with law. The finding is against the relators, and their petition is dismissed, and they required to pay the costs.

*G. J. Marriott*, for the Relators.

*P. W. Pool, Finley & Gallinger, Beer, Bennett & Monnett*, for Respondents.

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(Third Circuit—Logan Co., O., Circuit Court—Oct. Term, 1898.)

Before Day, Price and Norris, JJ.

THE TOLEDO & OHIO CENTRAL RAILWAY CO. v. SUMNER  
A. MARSH.

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*Bill of Exceptions filed before overruling of motion for new trial—  
Effect—What matters before reviewing court—*

(1). On April 2nd, 1898, the bill of exceptions was allowed and signed, made a part of the record, and filed with the papers in the action. All this before the motion for new trial which had been filed within the three days was overruled, and before judgment was entered upon the verdict.

Held, that the action of the court in that regard must be challenged not before, but after the court has acted. And that the steps to save for review those matters to which the character of error can only be imparted by the trial court in its adverse adjudication of the motion for new trial, or by its decision, must be taken after the decision is made or the motion is overruled.

*Presumption that charge responsive to evidence--*

(2). When the charge is in all things applicable to the issue tendered by the pleading, it must be presumed, in the absence of steps taken to save the case for review upon the evidence, that there was submitted to the jury at the trial evidence to support the issues in the pleadings, and that to the evidence so given, the charge is responsive.

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*Ejection from R. R. train—When action on tort—*

- (3). Where one is wrongfully ejected from a railway train, even in the absence of the use of excessive force by the servants of the railroad company, and whether or not the relation of the parties originated in contract, he may seek his remedy as for tort.

*Ejection—When an assault, right to be on train no element as to right to recover—*

- (4). When the force used to eject amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train, is not an element in the question of mere recovery.

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NORRIS, J.

The defendant in error, Sumner J. Marsh, in his petition in the action which is sought to be reversed, says, that before the 23rd of September, 1896, the plaintiff in error, the Toledo & Ohio Central Railroad Company, who was defendant below, offered and advertised to carry passengers on the 23rd and 24th of September, from West Mansfield in this county, to the city of Columbus, to return on the 25th of the same month, for \$1.30, and advertised that it would sell tickets for this purpose at its ticket office at West Mansfield on the 23rd and 24th. On the 23rd of September, 1896, plaintiff went to defendant's ticket office at West Mansfield for the purpose of availing himself of this offer of defendants, to sell a ticket from West Mansfield to Columbus and return during these dates for \$1.30, and found no agent of defendant there and the ticket office closed, and could not for this reason purchase a ticket for this trip. When the train came and stopped at the station of West Mansfield, he entered the defendant's cars for the purpose of making this journey for the price advertised: he had no ticket; he offered the conductor one-half of the advertised fare from West Mansfield to Columbus and return, namely, 65 cents, and offered to purchase of the conductor a ticket to Columbus and return, and offered to buy a ticket at the first stop where a ticket office was found open, to buy a



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ticket to Columbus and return; but the conductor refused each of these offers, refused to allow plaintiff to continue on the train, and he and the brakeman, all agents of defendant company, violently and with wantonness, and with unnecessary force ejected him from the train at a point six miles from his home, and before the end of the journey, and in so doing maltreated plaintiff and injured him, and that he was thereby caused pain and suffering, and was prevented from attending to his business in the city of Columbus, in all to his damage of \$2,000, which he seeks to recover.

Defendant railway company, by its answer, admits that plaintiff boarded its train at West Mansfield, which left West Mansfield at 5-18 of the morning of the 23rd of September, 1896, and offered the conductor 65 cents, which the conductor refused to accept.

It admits that it advertised to sell tickets from West Mansfield to Columbus and return for \$1.30, good September 23, 24 and 25, 1896, which was one-half of the regular fare for said trip, and denies that it offered to carry passengers on said trip at a price less than the regular fare, other than those who provided themselves with these round trip tickets.

Defendant says that plaintiff boarded this train at West Mansfield with full knowledge of this, and knew when he went to West Mansfield that he could not purchase a ticket at said office at that time of day, and that the defendant did not require or have its office at this point open for business of any kind at that hour. And knew when he got on the train that he would not be permitted to ride at reduced rates without a ticket permitting to do so. All else in the petition is denied by the answer.

Plaintiff says in his reply that these tickets were not on sale before the 23rd of September, and that on the day before, on the 22nd of September, 1896, plaintiff informed defendant's ticket agent at its office in West Mansfield, that

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he intended to take this trip on this morning train and would want an excursion ticket as offered in said advertisement, and that defendant's agent did not inform plaintiff that no ticket would be on sale at said office for said morning train for said trip, and that defendant is precluded by this neglect of its agent from making said defense.

The issues thus tendered were submitted to a jury in the trial court, which resulted in a verdict for the plaintiff for the sum of \$443.75.

On the 2nd day of April, 1898, the defendant, plaintiff in error here, presented its bill of exceptions embodying the evidence at the trial and such record history of the proceedings up to that date, as it is the office of a bill of exceptions to save, which bill was on that day allowed, signed and ordered to be made a part of the record and filed with the papers in the action.

On the 4th day of April, 1898, the case came on to be heard in the trial court upon the motion to set aside the verdict and for a new trial, which motion had been filed within the time prescribed by law. Upon the hearing of this motion, on the suggestion of the court, plaintiff submitted to entry of a remittitur, of so much of the verdict as exceeded \$300, and that being entered the motion for new trial was overruled and judgment entered upon the verdict for \$300, to all of which defendant excepted, and prosecutes error here for purposes of reversal.

The errors assigned in the petition in the case are:

First: Error in admitting evidence offered by plaintiff.

Second: Error in rejecting evidence offered by defendant to sustain the issues on its behalf.

Third: Error in the charge to the jury.

Fourth: That the verdict is not supported by the weight of the evidence.

Fifth: The verdict is contrary to law.

Error in overruling the motion for new trial.

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In the motion for new trial are the additional assignments, that the court erred in refusing to charge the jury as requested by defendant, and that the verdict is excessive.

We are of the opinion that the parts of the record of this proceeding which are dependent for review upon a motion for new trial and a refusal by the trial court to allow the motion, are not brought into this record and presented here for investigation. The statute providing for presenting and allowing bills of exceptions and fixing the time within which the same shall be done, determines the period to be within fifty days after the overruling of the motion for new trial or the decision of the court when a motion for new trial is not necessary. So that it would appear that the steps to save for review, those matters to which the character of error can only be imparted by the trial court in its adverse adjudication of the motion for new trial or in its decision, must be taken after the decision is made or the motion is overruled, otherwise the matter has not been finally determined and the error does not exist, and it would follow surely that an exception to an error that has not been committed saves nothing as in this case; it contemplates trouble that may never present itself, and a mistake that the chances are at least even will never be made.

The right to review this case on the weight of the evidence, or on the claim of excessive damages found by the verdict which can only be determined upon examination of the evidence; or on the error claimed by refusing to charge as requested which is assigned in the motion for new trial, but not in the petition in error; or upon the overruling of the motion for new trial, should be saved in the manner pointed out; that is in challenging the action of the court not before, but after the court has acted.

So the matters assigned for error which preceded the motion and do not arise upon it for review are:

First: Error in the admission of evidence over the defendant's objection.

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Second: Error in rejecting evidence offered by defendant in its behalf.

Third: Error in the charge to the jury as given.

Fourth: That the verdict is contrary to law—that is here to say, not that it is illegal because not supported by the evidence; but that the verdict was induced by and rests upon some erroneous exposition of the law by the trial court.

As to the assignments that there is error in the admission and in the rejection of evidence, we have examined the record carefully with this in view, and find nothing in this regard to the prejudice of the plaintiff in error.

As to the charge as given, we have inspected it thoroughly and find that it fully covers all the issues and correctly gives the law applicable to the controversy as presented by the pleadings. And this is as far as we can go in the direction indicated by this assignment of error, because the evidence is not here for review, and we may not measure how far it is or is not applicable to the facts as shown by the evidence.

The plaintiff asserts that the defendant offered by advertisement to sell him a ticket from West Mansfield to Columbus and return for \$1.30, good on the 23rd, 24th and 25th of September, 1896. That he went to its ticket agent at West Mansfield on the 22nd of September, and notified and informed defendant's ticket agent there at defendant's ticket office, that he would be there on the morning of the 23rd to buy a ticket of the kind offered, for the purpose of riding to Columbus on that morning train. That was a train upon which a ticket of that character warranted a ride. He went there before the train came, could get no ticket because the office was closed; got onto the train without a ticket, made offer of reduced rate to Columbus which was refused by the conductor, who plaintiff says by wanton and excessive violence ejected him from the train, and that he was by this act of the conductor's physically injured. Of

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the salient points of plaintiff's case as he thus states it, defendant makes denial, and we find that to these issues, the charge is in all things full and applicable. And we must in the absence of something to the contrary upon the record appearing, conclude that there was evidence which supported these issues on behalf of plaintiff and to which the charge of the court was responsive.

Without commenting upon the cases cited by plaintiff in error and which we have carefully examined and which, in the absence of excessive force, seem to point to the contract for remedy, and not to any remedy in tort. We are inclined to the contrary holding as supported by the best guarded reasons and authority, to use the language in the *Railway Company v. Reynolds*, 55 Ohio St., 384, that in such case, "a railway company will be made liable by the act of its agent in following its rules, where the appearances on which he acted was created by the fault of another agent of which he had no knowledge. Such a contingency is a risk incident to the privilege of making rules, and the company should suffer for the fault of its agent that causes the mistake rather than an innocent person."

Here, in this case, is the further element of excessive force and wanton assault, which, with all else eliminated, and whether plaintiff was in said car by right or wrong, supports the action and warrants the exposition of the law as given in the charge and the conclusion of the jury as evidenced by the verdict. Finding no error on the face of the record to the prejudice of plaintiff in error, the judgment is affirmed at costs of plaintiff in error, and the case is remanded for execution.

*George E. Crane, and Doyle & Lewis, for Plaintiff in Error.*

*Hounstine & Huston, for Defendants in Error.*

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Kewish et al. v. Wire.

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(Seventh Circuit—Lake Co., O., Circuit Court—Feb. Term, 1899.)

Before Burrows and Marvin, JJ.

LAMAR R. KEWISH et al. v. WILLIAM WIRE.

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*Injunction—Appeal—*

When a party desires to appeal to the circuit court, from an interlocutory order made by the court of common pleas vacating an injunction, and said last named court by its order suspends the operation of the order of vacation of the injunction for ten days, the party desiring so to appeal may perfect the same by giving the notice and entering into the undertaking provided by law, and the refusal of two judges of the circuit court in vacation, to order a suspension of the order of dissolution, will not have the effect of defeating the appeal.

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MARVIN, J.

The case of Kewish et al. against William Wire is before us on a motion to dismiss the proceedings in this court, and though we have not seen the transcript, we learn from the statement of counsel that the action was begun in the court of common pleas, and the relief sought for was an injunction to prevent the taking off of certain timber from lands, and for damages as well.

A preliminary injunction was allowed by the court of common pleas, and thereafter a motion was made to vacate that injunction. That motion was sustained. Notice of appeal was given and an undertaking entered into, as required by statute for an appeal. The court of common pleas, when it sustained the motion to vacate the injunction, ordered that the order vacating the injunction should be suspended for the period of ten days, and within that ten days, as we understand it, a motion was made before two of the judges of this court at chambers for an order to suspend the operation of the order vacating the injunction. That was refused, and it is now urged, in support of the motion made here, that there is no case properly in this court—that there is no appeal here.

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The section of the statutes which provides for an appeal from an order vacating a preliminary injunction, is 5226, and reads:

“In addition to the cases and matters specially provided for, an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court and of which it had original jurisdiction, if the right to demand a jury therein did not exist, and from an interlocutory order made by the common pleas court, or a judge thereof, dissolving an injunction, in a case of which it had original jurisdiction; but such interlocutory order dissolving such injunction shall not be suspended by the appeal, except by the order of the circuit court, or two judge thereof in vacation, on reasonable notice to the adverse party; provided that the court or judge may, at the time of making such interlocutory order, upon good cause shown, suspend the operation thereof for any period not exceeding ten days, within which period the party appealing may perfect the appeal.”

It will be observed that the language of the statute indicates that there may be an appeal without any suspension of the order vacating the injunction. The court of common pleas, when it makes its order vacating the injunction which was theretofore allowed, may or may not suspend the operation of the order thus vacating the injunction, for ten days.

It is not, as it seems to us, one of the essentials to an appeal from an order of this kind that the court or judge making the order of vacation shall suspend the operation of it for ten days. The court, or judge, may or may not suspend the operation. But the order is appealable, by the terms of the statute, without reference to whether or not there is a suspension of the operation of the order, and that the supreme court have held that there may be an appeal without interference of the circuit court or any judges of the circuit court, and without any action on the part of such judges, we think is manifest from the case to which our attention

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was called by counsel on the hearing of this motion—The Trustees v. McClannahan, in the 53 Ohio State Reports, beginning on page 403. Judge Williams in the opinion, at page 407, says in reciting the history of the case then being passed upon: "After the appeal was perfected, the operation of the order of dissolution was suspended, by two judges of the circuit court, until the appeal could be heard."

The appeal was perfected before the judges acted. From what has been said and from what has been read, we are of the opinion that there is a proper appeal in this case now in this court, and that the motion to dismiss the proceedings must be overruled.

In this view we are strengthened by comparison of the statutes as they existed before the present statute was in the terms in which it now is.

In the statutes of Swan & Critchfield, at page 1157, section 694, this language is used:

"That appeals may be taken from all final judgments, orders or decrees in civil actions in which the parties have not the right by virtue of the laws of this state, to demand a trial by jury, and interlocutory orders dissolving injunctions rendered by any court of common pleas in this state in which it has original jurisdiction, by any party against whom such judgment or order shall be rendered or who may be affected thereby, to the district court, and the action so appealed shall be again tried, heard and decided in the district court in the same manner as though the said district could had original jurisdiction of the action".

It is provided, as will be seen, by this section for an appeal in a case where an order is made, as in the present case, without any suggestion of any action on the part of the judges of the district court, which court is succeeded by the circuit court under the present judicial system. In the statutes published in 1880, section 5226, as it then stood, reads:

"In addition to the cases and matters specially provided



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for, such appeal may be taken by the party or other person directly affected from a judgment or final order in a civil action rendered by the court of common pleas, and of which it had original jurisdiction, if the right to demand a jury therein did not exist, and from an interlocutory order made by the court of common pleas or a judge thereof dissolving an injunction in a case of which that court had original jurisdiction; but such interlocutory order dissolving such injunction shall not be suspended by the appeal except by order of the district court or any two judges thereof in vacation, on notice to the adverse party."

So it seems to have been the policy of the law in Ohio, for many years, that an order made by the court of common pleas in a proper case, dissolving an injunction which had theretofore been allowed, might be appealed from to the district court, when there was a district court, and to the circuit court when that court came into existence, and the present statute, it seems to us very clearly, did not in any way lessen that right. The right exists just the same, and except for the provision of the statute as it now is and as it existed in 1880, there would have been no suspension of the operation of the order vacating the injunction. But now a party may have the appeal, and in addition thereto may have the right to apply to the circuit court or to two judges thereof for an order suspending the operation of the order dissolving the injunction.

It seems to us clear that the case is here on appeal, that is so much of the case as is involved in the vacation of the preliminary injunction. The motion, therefore, is overruled.

*Tuttle & Tuttle*, for Plaintiffs.

*Homer Harper, G. W. Alvord, and E. F. Blakely*, for Defendant.

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Gill v. Sealbridge.

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(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1898.)

Before Smith, Swing and Cox, JJ.

GEORGE GILL v. BARNEY SEALBRIDGE.

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*Laws giving probate court of one county special jurisdiction constitutional—*

- (1.) The legislature, under the express terms of sec. 8, art. 4 of the constitution which provides for the jurisdiction of all probate courts, "and such other jurisdiction in any county or counties as may be provided by law", has authority to give to the probate court of Butler county jurisdiction concurrent with that of the common pleas court in actions, (1) for the partition of real property, (2) for the sale of real or personal property under a mortgage lien or other incumbrance, and (3) for divorce and alimony, and for alimony alone and custody of children.

*Laws conferring special powers on Common Pleas or Circuit Court of one county, unconstitutional—*

- (2.) Any law which relates to and regulates the jurisdiction of the court of common pleas is a law of a general nature, and must by the terms of the constitution have a uniform operation throughout the state. Therefore sec. 2 of the act of May 14, 1894, (91 O. L., 791) which attempts to confer upon the court of common pleas of Butler county the right and jurisdiction to transfer to the probate court of the county all cases then pending in said common pleas court on appeal from justices of the peace, or which might thereafter be appealed to said court, to the probate court, and to confer jurisdiction on said last named court to hear and determine the same, is unconstitutional. For the same reason, sec. 3. of said act, which provides that in all such actions appeals from the decision of the probate court shall be filed in the circuit court, and that petitions in error to reverse such judgments of the probate court shall be filed in the circuit court, must be held to be invalid.
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— Error to the Court of Common Pleas of Butler county.  
SMITH, J.

It appears from the papers in this case that on November 15th, 1888, the plaintiff in error, Gill, commenced a proceeding in replevin before a justice of the peace of Butler county against Sealbridge to recover the possession of one

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Gill v. Sealbridge.

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“stud colt”, of which he said he was the owner, and which the defendant wrongfully detained from him, and to recover damages for such detention. The writ issued to the constable was duly served and the horse taken and delivered to plaintiff, and a bond given, the horse having been appraised at \$200.00. When the parties appeared for trial, on the motion of the defendant, the plaintiff was ordered to give security for costs. This he refused to do, and thereupon the justice dismissed the suit of plaintiff and heard evidence as to the damages of the defendant, and rendered a judgment in his favor against the plaintiff for \$200.00 and costs. From this judgment the plaintiff appealed to the court of common pleas, and the transcript was duly filed in said court.

In January, 1889, a petition was filed, and on September 11, a motion for security for costs was filed, and which was furnished in September, 1894, and on November 21st, 1889, an answer was filed by leave. In 1894, the case was transferred by the common pleas court to the probate court for trial under the act found in 91 Ohio Laws, 791. In May, 1896, it being made to appear to the probate court that the papers in the case were lost or mislaid, leave was given plaintiff to substitute a new transcript and petition, which was ordered to be done by July 1st, 1896. On July 8th, 1897, it being made to appear to the court that the transcript and all the pleadings had been mislaid, including defendant's answer, leave was given the defendant to substitute and file a copy of the transcript and answer, which was then done. On the same day is an entry showing that the parties came, and a jury was impanelled and sworn and trial had, and a verdict for defendant, and his damages assessed at \$400.00. No judgment was rendered on this verdict, but on the next day appears an entry on the journal (July 9th, 1897), showing an appearance of defendant, but the plaintiff had failed to appear and had failed to substit-

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ute copies of pleadings, which were still lost or mislaid, and that defendant was allowed to file a duly certified transcript from the docket of the justice and a copy of the answer filed by him in the case, and that this was done; and that as plaintiff failed to appear and prosecute the case, a jury be impanelled to inquire into the right of property and the right of possession of the defendant in said property. And a jury being impanelled and sworn and a trial had, the jury found that the right of property and to the possession of the property was in the defendant at the commencement of the action, and assessed his damages at \$400.00, and thereupon judgment was rendered by the court in favor of defendant against the plaintiff for said sum of \$400.00 and costs. A motion for a new trial was filed but overruled by the court, on the remittitur by the defendant of \$100.00 of the judgment, and the judgment then rendered for the \$300.00. No bill of exceptions was ever allowed, and the question is whether on the face of the record this judgment was erroneous.

It is claimed by counsel that there was error committed to the prejudice of the plaintiff in error in quite a number of particulars, among others in these:

“First. That the probate court erred in rendering a judgment on July 9th, 1897, against the plaintiff in error, and in the rendition of the judgment of February 24th, 1898, modifying the judgment of July 9th, 1897, and rendering the judgment for \$300.00, when there was a judgment for defendant in the same subject matter for \$400.00.”

In fact, there was no judgment entered on the verdict, which appears to have been entered on July 8th. It is reasonable to suppose from what appears, that the case was submitted to the jury but once, though the entry shows two trials by the same jury, one on the 8th and one on the 9th. Doubtless there have been two entries by mistake of the one submission to the jury and the one verdict. When the second

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was entered, the first should have been stricken out, but it was not done. But even if there were two verdicts, as judgment was not entered on the first, we see no prejudice to the plaintiff in error.

Second. It is claimed that when the answer of the defendant asked damages in the sum of \$400.00, the probate court had no jurisdiction to try the issue, as the justice from whose docket the case was appealed, only had jurisdiction as to cases involving \$300.00 or less.

No claim for damages was made by defendant in the justice's court by way of answer. The property was appraised at \$200.00, and the justice had jurisdiction to try the case. His decision was appealed from. The common pleas then had jurisdiction of the case on appeal. The filing of an answer by defendant in the common pleas claiming damages in the sum of \$400.00 did not deprive that court of jurisdiction to proceed to try it. Under such circumstances our opinion is that the defendant was entitled to claim damages over \$300.00, and if proved, to recover that amount. I would be singular if the plaintiff in such a case, when the property was appraised at less than \$300.00, and a trial had in the justice's court, and the case appealed to the common pleas, could not there recover his real damages. Certainly he might do so, if the property were appraised by the constable and appraisers at over \$300.00, and the case then certified to the common pleas under the provisions of the statute. But in fact, judgment was only rendered for \$300.00.

Third. We see no error in the action of the court in allowing defendant to file a copy of his answer and of the transcript. The plaintiff had been ordered to do so long before and had failed to comply with the order.

Fourth. It is claimed that plaintiff's counsel had no notice of the case being set for trial. This does not appear from the record. Full notice may have been given to them,

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and for all that appears, 'they may have been present at the trial.

Fifth. It is claimed that the verdict in the case did not comply with the law of 1891, 88 O. L., 275. This action, as we held in another case, having been brought long before the passage of the amendment, was not governed by its provisions, and the form of the verdict was correct.

Sixth. It is further claimed that this judgment is illegal and is a nullity, for the reason that the statute passed May 14th, 1894, (91 O. L., 791), "enlarging the jurisdiction of the probate court in certain counties", and which at the time of its passage, and perhaps at this time, only affects the county of Butler, is in contravention of the constitution of the state. That is, that the legislature had not the right, as is done by the statute, to give to the probate court of one or more counties, jurisdiction in partition cases, actions for the sale of real property under a mortgage lien, actions for divorce, etc., or to hear and determine cases appealed to the court of common pleas which may be transferred to it by said court, when in other counties of the state, probate courts have no such jurisdiction. The question then is, whether under the constitution of this state, such power and jurisdiction can be conferred on one only of the probate courts of the state. Section 8, of article 4, of the constitution, after providing for and specifying what jurisdiction every probate court in the state shall have, says, "And such other jurisdiction in any county or counties as may be provided by law". And then the further question arises whether on other grounds this statute is in conflict with any of the provisions of the constitution, so as to make the same or other part thereof invalid for this reason.

In my opinion the legislature, under the express terms of the section of the constitution already quoted, section 8, article 4, which provides for the jurisdiction of all probate

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courts, "and such other jurisdiction in any county or counties as may be provided by law", has authority, to do what was attempted to be done by the first section of the act in question—that is, to give to the probate court of Butler county jurisdiction concurrent with that of the common pleas court in actions, (1) for the partition of real property, (2) for the sale of real or personal property under a mortgage lien or other incumbrance, and (3) for divorce and alimony, and for alimony alone and custody of children. It seems to be the plain meaning of this provision of the constitution that a probate court in one or more counties may have given to it by the legislature jurisdiction not conferred upon other probate courts unless thereby other constitutional provisions are infringed upon, and such was the distinct holding of Judge Ranney in deciding the case of *Giesy v. R. R.*, 4 Ohio St., 308, at page 320, and of Judge Scott in deciding the case of *Kelley v. State*, 6 Ohio St., 269, at page 272, and without any dissent on this point. We think therefore that section 1, of the act is a valid law.

Section 2, of this statute attempts to confer upon the court of common pleas of Butler county the right and jurisdiction to transfer to the probate court of the county all cases then pending in said common pleas court on appeal from justices of the peace, or which might thereafter be appealed to said court, to the probate court, and to confer jurisdiction on said last named court to hear and determine the same. It is expressly held in the case of *Kelley v. The State*, 6 Ohio St., 269, that any law which relates to and regulates the jurisdiction of the court of common pleas is a law of a general nature, and must by the terms of another section of the constitution have a uniform operation throughout the state. It is clear that the section of the law under discussion does not do so. It applies only to Butler county, and no other court of common pleas in the state has the

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right or authority to transfer cases pending in that court to a probate court for trial, and we are of the opinion therefore that this whole section is invalid, and that the court of common pleas had no right to transfer this case to the probate court, and consequently that the probate court had no right or jurisdiction to try it, and that its action was a nullity. For the same reasons, the provisions of section 3, of the act, which provides that in all such actions appeals from the decision of the probate court shall be filed in the circuit court, and that petitions in error to reverse such judgments of the probate court shall be filed in the circuit court, must be held to be invalid. They not only deprive the court of common pleas of Butler county of the right conferred by other statutes to entertain appeals and petitions in error in proper cases from entertaining the same, thus changing the jurisdiction of that court, but attempt to do the same with the jurisdiction of the circuit court, in giving it rights not conferred upon any other circuit court in the state. These provisions also must be held to be invalid. The result of this holding is that this court has no jurisdiction whatever to hear or determine the question, whether the probate court erred in the rendition of the judgment complained of; and the case must be stricken from the docket.

*Morey, Andrews & Morey*, for Plaintiffs in Error.

*A. F. Hume*, for Defendant in Error.

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(Fifth Circuit—Licking Co., O., Circuit Court—Mar. Term, 1898.)

Before Adams, Douglass and Voorhees, JJ.

THE STATE OF OHIO ex rel. THOMAS B. FULTON v. THE  
BOARD OF DEPUTY STATE SUPERVISORS OF LICKING  
COUNTY, OHIO, et al.

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*Election—Sec. 9 of Election Law—Requirements not mandatory—*

- (1). The requirement of section 9, of the Election Laws of Ohio, (93 Ohio Laws, 189), that in cities where the voters are registered, the nomination of city officers shall be filed with the city



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board of elections not less than fifteen (15) days previous to the day of election, is not mandatory.

*Same—Filing of certificate of nominations—*

- 2). Where it appears that such certificate has been filed in ample time in which to advertise for bids and print the ballots, and no objection is made otherwise, except as to the precise time in which it was done, and that the non-observance in this regard could not affect the result of the election, its fairness or honesty, such certificate so filed will be deemed to be filed in time, notwithstanding the requirement of the statute is mandatory in form.

*Same—Filing original instead of certified copy—*

- (3). That the duty imposed by section 13 (93 Ohio Laws, 190), relative to the transmission of certified copies of certificates of nomination, is legally performed when such board has duly certified the original certificate instead of a copy thereof as provided by this section.

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MANDAMUS.

VOORHEES, J.

The case of The State of Ohio, ex rel. Thomas B. Fulton v. The Board of Deputy State Supervisors of Licking county, Ohio, and William Christian, Andrew J. Crilley, James J. Hill, Samuel Woolway, as Deputy State Supervisors of Elections for Licking county, and Robert W. Howard, as Clerk of said Deputy State Supervisors, is a proceeding in mandamus to compel the defendant Board to print the tickets for the democratic party nominated at a convention held in this city.

Our attention will be first directed to the demurrer of the Board filed to the petition. It is claimed by the demurrant that the petition does not state facts sufficient to entitle plaintiff to the relief, because the certificate was not filed with the Board of Elections of this city, it being a city requiring registration.

The petition does not disclose the fact that Newark is such a city. There is no allegation in the petition that would require the certificate to be filed with any other Board than as indicated by the facts set forth in the petition; and

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it is not necessary to consume time in the consideration of the question raised by the demurrer; and therefore the demurrer will be overruled.

This brings us to the consideration of the questions that are presented by the answer and reply that have been filed in the action.

We may summarize the facts as admitted by the pleadings, and as found by the court, as follows:

"On March 4th, 1899, at a primary convention held by the democrats of Newark, the relator, T. B. Fulton, was nominated for the office of city solicitor, and others were nominated for various offices as set forth in the petition. The chairman and secretary of said primary, or convention, made out in due form of law a certificate of all of said nominations, and duly verified the same. On March 13th, 1899, said original certificate of nominations was filed with the defendant Board. On March 24th, 1899, the relator demanded of defendant Board, while in session, that his name, and the names of all of said candidates, be printed on the ballot to be used at the election to be held on April 3rd, 1899. Said Board refused so to do."

Newark is a city in which the voters are registered, and are required by law to be registered. On March 20th, 1899, and not earlier, said original certificate of nominations was presented to the President of the City Board of Elections of said city of Newark. On March 21st, said original certificate was filed with the clerk of said city board, and said filing is endorsed by him on said certificate, as appears on said certificate. On the same day, March 21st, 1899, a motion was voted on by said city board to confirm said democratic nomination, and said motion was lost. That on said 21st day of March, 1899, the secretary of said city board handed said original certificate of nominations to William C. Christian, who was then, and still is, the chief deputy supervisor of said defendant board, and the same has ever since remained in the possession of

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said Christian, or of the secretary of said defendant board, (Howard).

The said Board of Elections never certified any copy of said certificate of nominations to said county board, and never took any action or did anything towards transmitting to said county board, either a copy, or the original of said certificate of nominations, except as hereinbefore stated. No objections were ever made or filed to said certificate of nominations. No claim is made up to this time that defendant board has printed the ballots for said election.

The question involved in this case is to be determined by the construction to be given to several sections of the statute of this state, regulating the conduct of elections, and the duties of certain officers in connection therewith.

The purpose of these enactments was to provide the mode of conducting elections, to insure the secrecy of the ballot, and prevent fraud and intimidation at the polls. To this end, and as a part of the system, provision is made for the mode and manner of making nominations of candidates for public offices, as well as for their election after they are so nominated.

Nominations of candidates for public offices may be made, among other ways and methods, by convention, caucus, meetings of the qualified electors to be held by such electors representing a political party which, at the next preceding general election, polled at least one per cent. of the entire vote cast in the state. Such party may make one nomination for each office to be filled at the following election, which nomination, to be valid, must be certified as provided by law.

Every certificate of nomination shall state such facts as are required in the act regulating the same for its acceptance, and shall be signed by the proper officers of such convention.

In the case under consideration, no objection was or has

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been made in any way or manner to the certificate as to the form or substance as made and certified by the officers of the convention that made the nomination. So we will pass at once to the question as to whether or not the certificate of nominations has passed into the possession of the defendant Board, under the provisions of the law, which will entitle the relator to the relief prayed for in his petition.

By the ninth section of the election law, it is provided that, in cities such as the city of Newark, where the voters are registered, the nomination of city officers shall be filed with the City Board of Elections not less than fifteen days previous to the day of such election. It is provided in the next section (sec. 10) that certificates of nomination and nomination papers, when filed, shall be preserved and be open, under proper regulations, to public inspection. The certificate of nomination so filed, if in apparent conformity with the act, shall be deemed to be valid.

I wish to notice the language again (and I am quoting from the statute): "If the certificate is in apparent conformity with the statute",— not necessarily in exact conformity;—and the legislature has not seen proper to define just what that is; but, if it is "in apparent conformity", then "it shall be deemed valid, unless objections thereto are duly made, in writing, within five days after the filing thereof".

No objections in writing or otherwise have been filed to the certificate in this case with the defendant board, or the City Board of Elections of this city. The only thing appearing in the record is the motion to confirm the democratic nominations as hereinbefore stated; which motion was lost. There was no dispute in the board, nor were there any questions arising in the course of the nomination of any of these candidates, before said board, or either of them. Therefore, there was no question of dispute to be submitted to any other tribunal, such as the State Supervisor of Elections.

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So, the contention remains, viz: Whether the certificate, being in apparent conformity with the statute, shall be deemed valid.

The contention is, that as the certificate was not filed with the City Board of Elections, not less than fifteen days previous to April 3rd (the day of the election), it is utterly void. This contention raises a question requiring the construction of sec. 9 of the election laws. If the requirement as to time of filing is mandatory, certain results will follow. If it is merely directory, then other questions may be properly considered. If it is mandatory as to the filing of the certificate, then it will put an end to this controversy, if it was not so filed within the time prescribed by the statute.

If the purposes of the law are, as we have intimated and supposed, primarily, to secure: First: An honest and fair nomination for public office; and, Second: Fairness and honesty as a result of the election, the question may be presented in this form: Should this object of the statute be defeated by a mere irregularity, which would not and could not make the result of the election doubtful? We think it should not receive such construction, unless the language of the statute is so explicit that the intention of the legislators can only be ascertained by giving it this mandatory construction. Is not the question of time in the statute analogous to the question of time in a contract, being, or not being, of the essence of the agreement? It may be stated as a general rule, that time is not of the essence of a contract unless it clearly appears from the nature of the subject-matter of the contract, that the parties intended that it should be of the substance or essence of the contract; or that its spirit and its purpose would be defeated unless effect be given to the time named therein.

Unless it can be asserted that the object and purpose of this election statute, having for its primary object the sec-

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uring of correct nominations and honest elections, will be defeated if these certificates of nominations are not filed with the proper board exactly within the time mentioned in the statute, then the mandatory construction is not the true construction.

Attention will be directed to some of the provisions of the statute bearing upon this question if literally construed:

First, the certificate must be filed not less than fifteen days previous to the day of such election. Then there are five days given for filing exceptions or objections to the certificate. That leaves ten days. The statute also provides that the county board shall advertise for bids for printing the ballots for ten days; and the ballots must be printed and ready for delivery within three days before the election.

If all these things or requirements are to be strictly construed as to time, they cannot be done in fifteen days, if the whole limit of time is given. It would require at least eighteen days.

So, it is apparent that these provisions as to time are not mandatory, but directory; and, being so, a failure to strictly comply with these provisions as to time will not invalidate or destroy the purpose of the enactment, viz: to secure an honest and fair election.

We look upon these omissions as mere irregularities.

How should such irregularities be considered? McCreary's Election Laws, Sec. 190:

"Those irregularities which are not declared by law to be fatal, or which do not render the result of the election doubtful, should be ignored, and the provisions of the law that were infringed upon by such irregularity should be deemed merely directory."

If the legislature had contemplated or intended that this question of time for filing the certificate should be unchangeable, would it not have said, unless the certificate is filed not less than fifteen days before the election, the filing

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of the same after that time should be void, and of no effect? Then the intention of the legislature would be manifest that it intended to make time the essence of the law.

The same purpose can be accomplished under the law by holding that this provision as to time is directory, rather than mandatory. To hold it to be mandatory in a case such as is shown here would, in the language of Judge Pugh, in *Gregg v. Rogers*, 1 N. P. R. 121, "be repugnant to one's sense of fairness and justice". How can any one be prejudiced? How could the public be prejudiced? How could any citizen or elector be prejudiced by giving a construction to the statute that an irregularity that is so apparent cannot be fatal to an honest election, but would practically disfranchise many citizens who are not in any way at fault?

In view of such consequences, this court prefers to regard that requirement of the law, viz: the filing of the certificate of nomination with these boards of election, as merely directory; so that a failure to comply with its strict letter did not render the certificate void when it was filed with the clerk of the city board but two days short of the time specifically named in the statute.

Our conclusion is that the certificate was legally filed with the city board. A filing with its clerk, and his endorsement thereof is sufficient to consummate a legal filing with that board or body; and we think that would be in analogy to the filing of a paper that must be filed in court: Filing it with the clerk is a filing in the court; and then the board, being considered as a judicial board, the filing of the paper with its clerk, brings it into the jurisdiction of that body.

In this case the certificate was legally filed with the city board; and, there being no objections filed to it, although there may be some informality or irregularity attending the filing, if it is apparently in conformity to the law, it shall be deemed valid.

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This brings us to the consideration of the second question:

Was the certificate properly transmitted from that board to the Deputy State Supervisors of this county, under sec. 13 of said election law? The contention is that under this section only certified copies of all nominations filed with the city board shall be certified to the Deputy State Board of Supervisors, and that no such copy of the certificate in this case was transmitted. But, the original was transmitted, or handed by the secretary of the city board to William C. Christian on the 21st of March, 1899, who was then, and still is, the Chief Deputy Supervisor of said defendant board.

We will first consider what the object of transmitting certified copies of the certificate to such board is:

We assume it to be to enable that board to discharge a duty imposed upon it by law, viz: To order and arrange for the printing of the ballots. The certificate should be certified so the board may know that it is genuine, and that the persons therein have been legally or duly nominated for the respective offices named in the certificate.

Grant this to be so, and, if this be the purpose, can a copy be any better or safer to furnish this information than the original itself? We think not. To hold that it can only be accomplished by a certified copy, would be an unreasonable construction, which we think is not required. That there are cases under the statute where copies would be required, is true. For example: Where there are several different boards to be certified to, copies would be used; but where the purpose (and there can be no other purpose), is to preserve the purity of the election — the purity and safety of the ballot, and the tickets that are to be printed are to have the stamp upon them that they are regular, the regular nominees; when there is no objection to the original certificate which has been certified,—no complaint made to it, when such certificate comes into the hands of the board



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that is to have the ballots printed, can there be any better evidence as to the correctness or genuineness of the nomination than what the original certificate would afford?

We can see no reason why the ballots cannot be as safely and correctly made from the original certificate as from a certified copy.

Therefore, we hold that the defendant board having received this duly verified certificate of the nominations, which had been filed with the secretary of the city board, the object and purpose of the law has been served and fulfilled; and it has been complied with by the deputy state board in printing the ballots when they do print them from that duly verified certificate.

It is made the duty under the law that the deputy state supervisors shall get a certified certificate from the city board to print the ballots. They have no discretion in the matter. The law imposes this duty upon them. But, they have refused, upon demand in this case, to print the ballots. We think, under the facts and circumstances, and from the construction of the statute as given by the court, they have no right to refuse; that this is a duty that is imposed upon them by law; that they cannot, in their discretion, determine to refuse to obey it.

Therefore the prayer of the relator will be granted, and the writ will issue.

*Hon. S. M. Hunter, Hon. J. B. Jones; T. B. Fulton, and J. R. Fitzgibbon* for Relator.

*Hon. T. W. Philipps; Hon. Chas. H. Kibler; G. C. Daugherty; Carl Norpell; and Frederic M. Black* for Respondents.

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Martin v. The State of Ohio.

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(First Circuit—Clinton Co., O., Circuit Court—Nov. Term, 1898.)

Before Smith, Swing and Giffen, JJ.

JOHN C. MARLIN v. THE STATE OF OHIO.

*Indictment of murder in first degree—Application to be admitted to bail—Refusal to hear—*

- (1). On the facts hereinafter stated, Held: That the trial court did not err in refusing to hear the application of the defendant to be admitted to bail, he being indicted for the crime of murder in the first degree, and the time for his trial fixed for an early day at the same term of the court.

*Appointment of counsel to assist in prosecution—Motives of assistant counsel—Discretion of court—*

- (2). The appointment of an attorney at law by the court of common pleas, under the provisions of sec. 7196, Rev. Stat., to assist the prosecuting attorney in the trial of a criminal case pending in such court, though on the showing made, it would seem to have been an unsuitable appointment owing to the feeling of the person so appointed against the defendant, and his personal interest in his conviction, is not of itself sufficient to justify a reviewing court in reversing a judgment against the defendant on that ground alone. It might be good ground for so doing if it were made to appear that by reason of such feeling the substantial rights of the defendant were prejudiced, which does not appear in this case.

*Dying declarations—When admissible—The evidence brought before the court must be brought before the jury—*

- (3). Where in a homicide case alleged dying declarations of the person charged to have been killed by the defendant on trial, are sought to be offered in evidence against him, (such declarations being in writing and purporting to be signed by the declarant), and the question whether such declarations are competent and admissible in evidence against him is submitted as a preliminary question to the trial judge, in the absence of the jury, and evidence is introduced thereon, and it is held by such judge to be competent and admissible, it is error to allow such alleged declarations to go to the jury as the dying declarations of such person, unless the state shall first offer evidence to the jury tending to show that they were in fact dying declarations of the deceased person, made by him *in articulo mortis*, or *in extremis* and under a sense of speedy and impending death, which excluded from his mind all hope of recovery; that the jury might thus be advised by the evidence so offered by the state, and that offered by the defendant on this point (if any), what the facts as to those questions were, so that they could properly decide whether they were in fact dying declarations of the deceased person, and the weight and credit to be given to them, if any.

*Charges filed in Masonic Lodge—When admissible—*

- (4). The trial court erred in this case in allowing the state to offer evidence as to what took place in the Masonic Lodge in regard to the proceedings of such lodge, and of its officers as to a complaint filed therein against the defendant on the charge of unmasonic conduct. It was admissible to show that a copy of the charges so preferred, was served upon the defendant, by an

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officer of the lodge, shortly before the killing of McMillan by the defendant, as tending to show a motive on the part of defendant for acting as he did.

*View—Presence of prisoner—*

- (5). On the facts shown in the record, it does not appear that the defendant was prevented from being present at the view of the premises where the shooting took place, made by the jury under the order of the court at the request of both parties; nor does the record show that he was not present, and it is not claimed by the defendant or his counsel that he was not present. The claim of defendant being that as he was in the custody of the sheriff, it must be conclusively presumed that he was prevented from attending the view. While it is the better practice to have the record show affirmatively that he was present, or that he refused to attend, if such was the case, the judgment should not be reversed if it does not so appear.

*Court withdrawing evidence from jury after admission—*

- (6). If evidence is admitted under the claim of counsel, that other evidence would be produced, which would make it competent, and without which other evidence, it would not be admissible, and such other evidence is not produced and the evidence before heard is by the court wholly withdrawn, and the jury clearly and distinctly told to disregard it, the judgment should not for such first admission be interfered with.

*Evidence of improper relations with wife of deceased—Evidence of character of wife admissible—*

- (7). Evidence tending to show that improper and criminal relations had existed between the defendant and the wife of the deceased, for some time previous to the homicide, was properly received. If such were the case, it might be relevant as tending to show a motive on the part of the defendant to take the life of the husband. But where such evidence was introduced by the state, it was error for the court to exclude evidence offered by the defendant, tending to show that during all of this time the character and reputation of the wife as a pure and virtuous woman was above reproach.

*Self defense—When killing justifiable—*

- (8). In the general charge of the court to the jury on the law of self defense in a case of this kind, the jury was instructed, that to justify the defendant in taking the life of his assailant, "it must appear that the defendant at the time of firing the fatal shot, in good faith, and in the proper and careful exercise of his faculties, believed, and had reasonable ground for believing that he was in imminent danger of death or great bodily harm from such assault. The mere belief alone of such danger is not sufficient to excuse a homicide. He must have arrived at such belief by the careful and reasonable use of his faculties; and further, he must have had reasonable ground for believing the existence of such danger; *such grounds as would cause a man of ordinary courage so to believe.* Held, that the language of the said charge in italics, and similar language used in other special charges given by the court to the jury at the request of the counsel for the state, was erroneous and prejudicial to the rights of the defendant.

Error to the Court of Common Pleas of Clinton county.

SMITH, J.

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The plaintiff in error having been indicted by the grand jury of Clinton county, on a charge of murder in the first degree for the killing of George McMillan, after a trial lasting two months, was found guilty of the crime of manslaughter, and was sentenced to be imprisoned for two years in the penitentiary, the jury having recommended him to the clemency of the court. Within the proper time after the rendition of the verdict, a motion for a new trial was filed on behalf of the defendant, assigning many reasons therefor. Some of those were for alleged errors in rulings made at the trial by the presiding judge, and that the verdict was manifestly against the weight of the evidence. This motion was overruled by the court, and the defendant excepted, and in due time bills of exceptions were allowed and signed by the trial court, purporting to contain all of the evidence offered at the trial, with the rulings of the court as to the admission or exclusion of evidence over the objection of defendant's counsel; the special charges given by the court to the jury before the argument of the case, at the request of the counsel for the state, against the exception of defendant's counsel, and the special charges asked by defendant to be given to the jury before the argument which were refused, and the exceptions taken to the same; and the general charge as given by the court to the jury, and the exceptions taken thereto by defendant's counsel. They also contain the action of the court on the application to admit defendant to bail after his indictment and before his trial, and, on the application of the prosecuting attorney, for the appointment of two members of the bar to assist the prosecuting attorney in the trial of the case, with the exceptions taken by the defendant to the action of the court on those matters. The result is that we have before us for consideration and review, those bills of exceptions containing nearly four thousand pages of manuscript, or typewriting, and presenting a very large number of questions for the consideration of the court, for all of these

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questions are raised by the petition in error, which is filed in the case. It would be almost impossible in any reasonable time to discuss all of the questions thus raised, and we will only refer to those on which counsel seem to rely and which it seems to us, are those only which require examination at our hands, and we will state our conclusions as to them as briefly as we can, considering the important questions involved.

The first question presented, in the order of time is, whether there was error in the action of the court of common pleas on the application of the defendant to be admitted to bail, after the return of the indictment against him and after the assignment of the case for trial thereon; and if so, whether it is a ground for the reversal of the judgment against him.

The facts in the case briefly stated are these: On the 18th day of January, 1898, the indictment against the defendant charging him with murder in the first degree was returned by the grand jury, and having been arrested by the sheriff on a warrant issued upon the indictment, he was committed to the jail of the county. On the 20th day of January, 1898, the defendant being arraigned in open court entered a plea of not guilty to the indictment. On the same day the defendant filed a written motion, asking for an inquiry and hearing of the charge against him, and that he might be admitted to bail, assigning various reasons therefor, among others that he was not guilty of any offense charged in the indictment; that the proof of his guilt was not evident, nor the presumption thereof great; that on the 9th of October, 1897, while engaged about his own concerns, he was unlawfully assaulted by George McMillan, and to save his own life he was compelled to shoot him, and that McMillan languished until January 15th, 1898, when he died; that he, the defendant, was arrested on a charge of maliciously shooting McMillan on October 9th, and gave

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bail in the sum of \$5,000.00; that the jail in which he was confined is an unhealthy one, and he fears that his health will be seriously impaired by his confinement therein; that it will be necessary for him to take the depositions of witnesses in Illinois, Dakota, and Colorado on this motion, and he asks the court to fix a day for hearing the motion and that he may be admitted to bail.

Thereupon on January 22nd, Judge Clark was assigned to hear the case, and on January 24th, the prosecuting attorney moved the court to assign the case for trial, and to dismiss the application for bail. On January 26th, the court sustained the motion of the prosecuting attorney to assign the case for trial and to dismiss the application of defendant to be admitted to bail. To this the defendant excepted, and a bill of exceptions was allowed showing the refusal of the court to hear evidence that was offered tending to show that the allegations of defendant's application were true. And the case was then assigned for trial February 23rd, 1898, and a venire for a jury issued for that day. Was this action of the court erroneous?

The constitution of the state, article 1, section 9, provides that:

“All persons shall be bailable by sufficient surety, except for capital offenses, where the proof is evident, or the presumption great ”

So far as we are advised, there is no statute of the state providing for a hearing of this kind after an indictment for murder in the first degree has been returned against a defendant; but we have no doubt, but that the court in a case where there are reasons to justify the action, may hear testimony in a case of that kind, and if satisfied that the defendant ought to be admitted to bail, to allow him to furnish it. But we are of the opinion that the holding of the supreme court in the case of Kendall v. Tarbell, 24 Ohio St., 196, justified the action of the trial court in this case. It

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is there held, that during the term at which an indictment charging a capital offense was set for trial, application was made by the accused for the court to hear testimony to show that the offense was in factailable. Held, that the application was properly refused. In the decision of Judge White, who spoke for the court, it is said:

“The indictment raises the presumption required by the constitution to justify the refusal of bail \* \* \* There were no special circumstances relied on as grounds upon which the court was asked to entertain the motion. It seems to have been regarded as the right of the party to have the testimony heard. We think otherwise.”

So here, the case was set for trial at an early day. No special circumstances were set up which would afford a good ground for hearing the application. It is true he alleges that he was justified in shooting McMillan; that the jail was unhealthy, and that he had to take the depositions of witnesses to be read on the hearing of the motion, not at the trial itself. But here the case was assigned for trial at an early day. We think it would not do, to allow the defendant to postpone the trial by merely filing his application. If so, he could defer it till a day or two before the day assigned for the trial, and thus postpone it indefinitely. In addition to this, if we were satisfied that the ruling of the court was erroneous, it is very questionable whether that would avail to cause the reversal of the judgment in this case—clearly no prejudice to the rights of the defendant is shown in this ruling, which would require us to do so.

The next question which arises, is whether the trial court erred in appointing Mr. Savage and Mr. Sloan, or either of them, to assist the prosecuting attorney in the trial of this case in the court of common pleas.

On the 24th of January, 1898, Mr. Hartman, the prosec-

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uting attorney, represented to the court in writing that the defendant was charged with murder in the first degree; that it would probably require several weeks to try it; that many intricate and difficult questions were likely to arise, involving more labor than any one attorney can properly perform without assistance; that five attorneys (naming them) already appear as counsel for the defendant, and that he believes that the public interest requires the appointment of an attorney to assist him in the trial of the cause.

Thereupon, on the same day, the defendant filed two affidavits made by himself in relation to the appointment asked for. In the first he avers that he is informed and believes that Mr. McMillan, whom he is charged with shooting, made several dying declarations implicating the defendant, which were reduced to writing by W. W. Savage, whom the prosecuting attorney asked to be appointed to assist him in the prosecution of the case, and that he, Savage, is an important and material witness in the case. And in the other he avers, that on May 27th, 1897, Mrs. Boyd died having executed a will which was duly admitted to probate in Clinton county, of which will the defendant was the executor and one of the devisees under the same, and that in 1897 the firm of Mills, Clevenger & Huls, attorneys, of Wilmington, and the firm of Smith, Savage & Thorpe, attorneys of the same place, all confederated together to wrong and injure the defendant, by causing to be printed a large number of circular letters, containing false, wicked and malicious libels against the defendant, and sent them to divers persons, (and a copy of the letter sent to some of the heirs of Mrs. Boyd, is set out), purporting to state the manner in which Martin, who it says is no relative of Mrs. Boyd, had wrongfully taken advantage of her weak mental condition and induced her to make the will in his favor, giving him all of her estate of the value of \$15,000.00 or \$16,000.00, with the exception of \$1,300.00 in money be-



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quests, and a life estate in some town property. The writers, Mills, Clevenger & Huls, propose to contest the will and carry the suit through to a final adjudication without any professional charge, if unsuccessful; if successful, they ask forty per cent. of the boy's share of the estate recovered. For this they say they "will associate with themselves, Messrs. Smith, Savage & Thorp, who will aid in our contest". In other statements this letter characterizes Mr. Martin's conduct in very strong language. The defendant further avers that Mr. Savage of the firm of Smith, Savage & Thorp, is the Mr. Savage whose appointment as assistant to the prosecuting attorney is asked. He also avers in his affidavit, that the individual members of the said law firm, designing and intending to injure the defendant, did make a contract with the heirs of S. S. Boyd substantially on the terms stated; that they filed a petition in the common pleas court (a copy of which is given), to set aside said will; that the said two firms appear as counsel for the plaintiffs and other heirs. That said firms and said Savage, have attempted to mould public opinion against the defendant. That he, the defendant, is financially interested in maintaining said will, and will be a material witness on the trial of said case and of this suit, and that said Savage had a financial interest in the setting aside of said will, and is personally and professionally interested in the conviction of the defendant, to aid and contribute to the success of said will contest. That he is, therefore, an unfit and unsuitable person to be appointed to assist the prosecuting attorney, and that neither the public interest or the due administration of justice requires it.

At the hearing of this matter the defendant offered those affidavits in evidence, and offered to prove the truth of the allegations therein contained, by other witnesses called for that purpose; but, "thereupon, the state conceded the facts set forth in said affidavit 'A', (which was the second affi-

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davit of the defendant above referred to), to be true", and the court then declined to hear any other evidence, and appointed Mr. Savage to assist the prosecuting attorney in the trial of said case, to which action the defendant excepted.

It is unfortunate, we think, in view of the allegations of fact made in said affidavit, that the truth of them was conceded, as was done by the prosecuting attorney acting for the state, if they were untrue; or if they were true, that the appointment of Mr. Savage was made, notwithstanding their truth. It would seem that the person appointed to assist in the prosecution of an accused person on behalf of the public should be actuated by a desire properly to represent the public interest, and should not be actuated by merely private and personal motives, or the desire to convict a defendant to gratify his own evil feeling, or to subserve his private pecuniary interests. It is but just to Mr. Savage to say, that in argument to this court he disclaims any such motives, and denies many of the allegations of the affidavit. But, however this may be, we know of no statute or law or rule of practice which was violated by the court in making this appointment; and there is nothing anywhere in the record, nor is there any claim made in the argument, that so far as the attorneys representing the state were concerned, there was any failure to conduct the prosecution in the fairest and most proper manner. If there was any error in what was done, no prejudice to the defendant is shown, even if by the appointment of Mr. Savage under the circumstances, and of Mr. Sloan as an additional assistant, (he to receive no compensation from the county for his services, and it is probable therefore, that he was to be compensated by private parties), the state did have the services of able and astute counsel to assist in such prosecution. This was what it was entitled to have, in view of the array of able counsel appearing for the defendant. The law expressly gives to

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the court the power to appoint an attorney, (and we think more than one if need be), to assist the prosecuting attorney in the conduct of the case, if it is of the opinion that the public interest requires that it be done. There is no provision in the statute, as to any special qualification or disqualification of the person appointed, and so far as we are aware, the uniform practice and usage of our courts, (which in some things makes the law in regard thereto), has intrusted to the court called upon to act a large discretion in matters of this kind. In the absence then, of any stated requirement, we would be disposed to hold that the action of the court in this matter was legal, not prejudicial, to this defendant.

It is strenuously urged by the counsel for the defendant below, that the trial court erred in allowing a paper writing purporting to contain alleged dying declarations of George McMillan, to go in evidence to the jury on the trial of the case. The following is a substantial statement of what took place in regard to this matter:

At a certain stage in the trial, one of the counsel for the state said to the court, that the next evidence they desired to submit was to be addressed to the court, and was not to be presented to the jury until the court heard preliminary evidence. There being no objection to this on the part of the defendant, the court directed the jury to retire from the court room, which it did, in the charge of the bailiff. The court then heard the evidence of Mr. Savage, and of Mr. Hartmann, in relation to what was claimed to be the dying declarations of McMillan, made by him, one on the 9th day of October, 1897, a few hours after he was shot, which it was testified to was reduced to writing by Mr. Savage and signed by Mr. McMillan, by his "X" mark, and the other reduced to writing by Mr. Savage October 11th, 1897, and signed by McMillan in the same way, and both of which appeared to have been attested by other witnesses than Sav.

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age or Hartmann, neither of which witnesses was examined as to the execution of the same. Those witnesses purported to give McMillan's version of the shooting, and it was stated in the first one, that he believed that he was going to die, and that he made the statement in that belief. The testimony of Messrs. Savage and Hartmann, who were fully examined and cross-examined as to the execution of those papers, and the mode and manner of the execution thereof, and of the physical and mental condition of McMillan at the time, and as to all that he said as to his belief as to his speedy and certain death, covers about seventy pages of type-written foolscap paper. The state then declined to offer further evidence to the court on this point, and submitted the question. Counsel for the defendant then suggested that all of the witnesses present at the execution of such papers be called. The court declined to order the state to do this, and inquired of counsel for the defendant if they desired to submit any testimony, and one of those replied that at present they did not, as to the competency of said dying declaration, but would object to them going to the jury on the ground that the evidence did not warrant the court in holding it to be competent. Thereupon the court said, that there remained nothing to do but for the court to pass upon the competency of this paper, and then stated that the declaration was admitted as evidence to go to the jury.

Thereupon, before the jury came into the box, the counsel for the defendant "objected to the introduction of said paper, or so-called dying declaration, until after the jury should have come out, and the state again makes a showing in the presence of the jury, *prima facie*, at least, or at least to such extent as the court might deem necessary to authorize the admission of the paper."

The jury were then brought into court by order of the judge, and Mr. Sloan, of counsel for the state, was about to read the paper to the jury:

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“When counsel for the defendant again objected until the state, in the presence of the jury, in open court, while the same is in session, shall first introduce, in the presence and hearing of the jury, testimony in its behalf tending to show the competency of the alleged dying declarations.”

This objection the court overruled, and the exception of the defendant was noted, and thereupon Mr. Sloan, one of the counsel for the state, said to the jury “I now read to you what purports to be the dying declaration of the deceased, George McMillan, as admitted to you, as stated by the court”; and the paper was then read by him to the jury.

Thereupon Major Blackburn, one of the counsel for the defendant, moved the court to exclude this declaration from the jury on the ground, substantially, that there was no sufficient evidence as to its competency given to the court, and no showing touching its competency in the presence of the court and the jury. This motion was then overruled by the court, and the defendant excepted.

The question whether this paper, under all the circumstances of the case, was properly allowed to be given as evidence to the jury, is an important one, vitally affecting the rights of the defendant in this case, and involving the correct rules of practice and procedure in cases of this character. It appears to us, that there is some confusion in the authorities, and it may be said that in some of the decisions as to dying declarations, and what evidence in regard to them is to go to the jury, and for what purpose that evidence is to be considered by the jury, language is used that seems to conflict with that used in other cases, and thus to create some confusion as to what is the true rule in regard to the question raised in this particular case.

There are some principles of law, however, in relation to dying declarations and their presentation to the jury, which seem to us entirely clear and well settled. In the first

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place, it is universally admitted, we believe, that the question whether what purports to be dying declarations shall or shall not be submitted as evidence to the jury, on the trial of a person charged with the killing of the declarant, must in the first instance be determined by the court, and can only be admitted when it is made to appear to the trial judge or judges by preliminary evidence offered to him or them, that they were made by the declarant while he was *in articulo mortis*, or *in extremis*, or at the least, in imminent danger of death, and were also made by the declarant under a sense of speedy or impending death, which excluded from his mind all hope or expectation of recovery. And we think, it is also the undoubted right of the court to hear this preliminary evidence in the absence of the jury, and perhaps he should do so on the application of the defendant, if the evidence is offered by the state, so that the minds of the jury should not be prejudiced by hearing incriminating statements of the declarant against the defendant, if on such hearing the court should hold such declarations to be not admissible. As we understand it, this rule of practice is for the protection of the defendant.

But, the question of difficulty and dispute in this case is this: suppose the court in this preliminary hearing, in the absence of the jury, holds that the declarations are admissible. What then? Must the same or similar evidence be now submitted to the court and jury, showing, or tending to show that such declarations were in fact made by the declarant, under such circumstances and in such state of mind as rendered them competent and admissible as dying declarations? If the declarations were oral, and were not reduced to writing and signed by the party making them, it would seem essential that the course suggested must be adopted, for how else could the jury be advised as to what the declarations in fact were, to whom made, and under what circumstances? And when the state offers any evi-

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dence to the jury on those points, it is entirely competent, if not necessary, for it to go over the whole evidence heard by the court on the preliminary examination, or other additional evidence on these points, and it would be the clear right of the defendant to cross-examine these witnesses on those matters, and to show if he could, that there were no such dying declarations made, or if there were, that they were made under such circumstances as showed that they were not in law dying declarations, or for any reason that they were not credible or entitled to any weight. And the defendant in such case would not be limited to the cross-examination of the witnesses offered by the state on these points, but when he came to his defense, might call any witness to show the same state of fact. And in any such case we have no question, but that it is within the legitimate province of the jury to decide upon all of the evidence offered, whether the alleged dying declarations were in fact made; or if they were, whether they were made under such circumstances as made them dying declarations in the eye of the law, and to decide all questions as to their weight, and the credit to be given to them. It is true that in such a case the court on the hearing of the preliminary evidence has held that they might go to the jury—that is, that on the evidence submitted to him, they were admissible. But his decision is not conclusive of the question; other evidence may have been submitted to the jury which completely disproved it, and the jury is the judge as to this, guided by proper instructions from the court.

Is the case essentially different when it is found by the court on the preliminary evidence heard by it in the absence of the jury, that the declarations in question have been reduced to writing and signed by the declarant, and that it was so executed under such circumstances as entitled it to go to the jury as a dying declaration? Is the state then bound to do more than to present the declaration to the

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jury, or must it be supplemented by other evidence showing the facts connected therewith—as that it was in fact signed by the declarant, who reduced it to writing, and all the circumstances connected therewith as in the case of an oral declaration?

Unquestionably, if the state did not offer any additional evidence tending to show these facts, the defendant when he comes to present his defense to the jury, would be entitled to show, if he could, as in the case of an oral declaration, anything which would destroy the weight and credit of such a declaration. He might offer convincing evidence that no such declaration was ever made—that the one produced was a forgery—that the person never made any such statement, or if he did, that he was not in immediate fear of death. But the question is, if it is the duty of the state to offer evidence in addition to the declaration itself, how is it absolved or released from that duty because the defendant has the right if he choose to do so, to attack the document as a dying declaration? If other evidence on the part of the state to make the paper competent is needed, it should not have been allowed to go to the jury without such evidence.

It is difficult to see why there should be a different rule in a case where the declaration is an oral one, and where it appears to have been reduced to writing by some one and signed by the declarant. We suppose that it would hardly be claimed by any one, that if the state in a homicide case sought to introduce oral statements of a declarant claimed to be his dying declarations, and on the preliminary hearing as to their admissibility, in the absence of the jury, the court should hold them to be admissible, that it would be at all allowable or proper for the judge himself to prepare a statement of what the declarations were, as testified before him, or have the stenographer make an exact copy of what the testimony showed that he said, and submit this



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as evidence to the jury of the dying declarations of the declarant. And yet this seems to us, in substance, what was done in this case—a paper purporting to be signed by McMillan is allowed to be read to the jury as the dying declaration of McMillan. There was not a syllable of evidence produced to the jury that he ever saw it, or signed it, or even made any such statement, or that, if he did, he was *in extremis* at the time, and had no hope or expectation of recovery. How can the document itself be competent? It is very questionable whether such procedure would not be in violation of that portion of the bill of rights in the constitution of our state which guarantees, that in any trial in any court, the party accused shall be allowed \* \* \* “to meet the witnesses face to face” \* \* \* “and have a speedy public trial by an impartial jury”. It is true that the witness who testifies to the dying declaration of a deceased person in a given case, is the witness who confronts the party accused, and if his testimony is heard in the presence of the jury, this constitutional right is not invaded. But in the case at bar, facts are claimed to have been proved, in the preliminary hearing before the court, by witnesses not heard by the jury, and on this testimony substantive evidence is allowed to go to the jury not established, or sought to be, by a single witness examined before the jury. Is the accused person not entitled to confront such witnesses before the jury, the final judges as to all questions of fact involved in the case?

But however this may be, on full consideration of the question as to the competency of this evidence, as given to the jury, we have come to the conclusion that when the state seeks to introduce in evidence as a dying declaration a written statement signed by the person whose death is being investigated, that the correct rule and practice is stated in volume 10, second edition of the Encyclopedia of Am. and Eng. Law, pages 386-7, thus:

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“In weighing dying declarations, the jury may take into consideration all the circumstances under which the declarations were made, including those which were proved to the court in laying the foundation for their admission.” \* \*

\* “Thus the jury may, notwithstanding the fact that those questions have already been passed upon by the court, determine whether the declarant was *in extremis*, and fully convinced of the fact when making the declaration” \* \*

\* “The same facts which were considered by the court in passing upon the admissibility of the declarations, must of necessity be considered by the jury in deciding upon their credibility. Hence, when the court having examined the question in the absence of the jury, decides in favor of the admissibility of the declaration, the preliminary proof should then be submitted to the jury to enable them advisably, and from all the lights which the facts and circumstances afford, to determine upon the credibility and force of the evidence.”

These several citations seem to be abundantly supported by adjudications of reputable courts in this country and England, referred to therein, and few, if any, to the contrary are cited; and the rule is so reasonable and proper as in our judgment to require its observance in all cases, whether of oral or written declarations. We are therefore of the opinion that the court erred to the prejudice of the defendant in allowing this declaration to go to the jury under the circumstances disclosed.

There is another question in connection with this alleged dying declaration, and its admission in evidence which was not adverted to by counsel in their argument of the case to us, and which owing, to the conclusions we have reached on other grounds, it is not necessary that we should pass upon, but which nevertheless presents an interesting question. It is this: The first of the two declarations was made October 9, 1897; the second on October 11, two days later. McMillan died January 15, 1898, more than three months after he was shot by defendant. As has been already stated,

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a declaration by the person injured, to be competent evidence as a dying declaration against the accused person, must have been made, as stated by the supreme court in *Robbins v. The State*, 8 Ohio St., 131, while the declarant was *in articulo mortis*, or, as said in the case of *State v. Kindle*, 47 Ohio St., 358, when *in extremis*. Both of these terms certainly imply, that to make a declaration of a person competent, the declarant must in fact be about to die; that this is as necessary to their competency as that the declarant believes that he is. It cannot be properly claimed in view of adjudged cases, that death in fact must occur almost immediately, or perhaps within a very short time after the making of the declaration. It has been held that evidence of such declarations is admissible when the declarant lingered in a dying condition for several days, and in one case even twenty-one days. Every case of course must stand on its own facts, and if the declarant lingered even three months, as in this case, this of itself, we suppose, would not render the evidence incompetent. But if the evidence in the case should show that when the declaration was made, death was not imminent, it would seem the evidence ought not to be received.

We are not clearly advised as to what the evidence in this case shows on this point. It was stated by counsel in the argument, and not controverted, that at some stage of his sickness, after he was wounded, he was brought from Wilmington to a hospital in this city for treatment, and afterwards was taken back to Wilmington. But it would seem that when a person lives so long after receiving a wound, that it does become a serious question, whether a declaration made by him soon after he was hurt, was in fact made when he was *in extremis*, or *in articulo mortis*.

It is claimed that the court erred in admitting a great deal of testimony in regard to what is known as the Masonic charges, over the objection and exception of the defendant.

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That such evidence was wholly irrelevant and incompetent, and that its admission was prejudicial to the rights of the defendant.

The questions arise in this way: At the trial of the case and as a part of its evidence in chief, the state called Mr. Rannels, and sought to prove by him that he was the secretary of the Masonic body of Wilmington, and that sometime in September, 1897, (which was before the said McMillan was shot by defendant), there was filed with him as secretary of such lodge, written charges against the defendant, Martin, charging him with unmasonic conduct towards a brother mason, George McMillan, in having been guilty of adultery with McMillan's wife, and seducing and alienating the affections of the wife of said McMillan. That it became his duty to notify Martin of that fact by preparing a summons and placing it in the hands of an officer, accompanied with a copy of said charges. That such summons, accompanied by a copy of said charges, which were signed by Robert McMillan, a brother of George, was by him placed in the hands of Mr. Lewis, appointed as the tiler of the lodge, in place of Robert McMillan, the actual tiler, for service on Martin, a date having been fixed by the lodge for the hearing of the charges. That the practice in such cases is, for the officer to make verbal return of the service, and that the date fixed for the trial was October 19. That the summons was placed in the hands of Lewis for service October 7th. That said charges were not tried on October 19th, for the reason that things had taken place which prevented matters from being pressed, viz., the shooting, and Martin being in prison, and that the reason the summons dated September 4th was not delivered to the tiler for service until October 7th, was that William McMillan, another brother of George, was the master of the lodge, and did not want to preside at the trial, and that the secretary was instructed to advise with the grand master, Barton Smith,

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of Toledo, to ask him to appoint a person to do so. That as secretary he received notice from the grand master that S. B. Evans of Circleville was to sit in the trial, and that this caused a delay in the time fixed for the trial. All of those several items of evidence were objected to by the defendant, and the objections overruled, and exceptions taken and the witness allowed to testify substantially to all of those matters.

Mr. Lewis then, under like objections, was allowed to testify to some of the same matters, and that the papers referred to were served by him upon Martin, October 8th, by leaving them with him personally. The charges themselves were then read to the jury, and this was excepted to.

The affray between Martin and McMillan, in which the latter was shot, occurred on October 9th, the day after the service of this notice and the copy of the charges on Martin. And though so far as appears, George McMillan was not a party to the proceeding, yet his brothers were, and the deceased was so connected with the transaction, and had such relations to those connected therewith, that we are of the opinion that testimony as to the service of those papers upon Martin, and that he received a copy of those charges, was relevant as tending to throw some light on the motive of Martin, or the state of his mind, in doing what he did a few hours after this time, when he thus became advised of this proceeding. In itself it is of small value, but as we have said, we deem it relevant. But much of the other testimony as to what was done by the lodge, after the presentation of those charges, why the trial was delayed, and other matters of this kind, seems to us wholly irrelevant, and to have had no possible relation to the act of the defendant under investigation, there being no evidence to show that he had any knowledge of them. That the reception of the evidence was probably prejudicial to the defendant seems clear. The jury are notified by this evidence

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that charges of a grave nature involving moral turpitude and very base conduct on his part have been preferred against the defendant before a body of highly respectable citizens, which deems them of such character as to require the trial of one of its members to see whether he is guilty as charged, and the jury is informed of various steps taken by the lodge with reference to such trial, and that the charges are still pending against him. All of this we think was incompetent, and should have been excluded.

It is also claimed that the court erred in not providing for the defendant to accompany the jury when they viewed the localities as to which evidence was to be offered, and that, as the defendant was in the custody of the sheriff at all times during the trial, and the record does not show that he was present at the view, it must be conclusively presumed by this court that he was prevented from being there.

The record shows that the view was ordered on the joint application of counsel on both sides, and there was entire agreement as to the points the jury were to visit in charge of the officer, and that counsel should be present. The record does not show that the defendant himself was present, but it is said by counsel for the state that he was, and this is not controverted by any one, and must be true, or counsel so able as those representing the defendant, if in fact he had been deprived of this right, would, in some legal manner, have made the record show that fact. The court in the trial of a case when a view is ordered, of course, should be careful that the right of a defendant to be present at the same, should be guarded and protected, and it would be well to have the record show that he was present or had the privilege of being present. But that it is necessary that it should so appear on the record, or that if it does not, that the judgment rendered should be reversed on this ground, we do not agree to.

The trial court admitted certain evidence as to the estates

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of Mr. and Mrs. Boyd, under the claim of counsel for the state that certain other evidence would be produced which would make it competent. This was not done, and thereupon the court withdrew such evidence from the jury, and clearly and distinctly instructed the jury that they should not consider it at all. Still it is claimed by counsel for the defendant, that if the evidence was incompetent, as is perhaps conceded, that this action of the court did not cure the error. We think the law of this state is otherwise, unless it be manifest that the hearing of the evidence was prejudicial to the rights of the defendant, which there is no reason to suppose in this case. See 16 Ohio St., 221; 19 Ohio St., 569, 571; 3 C. C., 551.

It is further claimed that the court erred in allowing evidence to be introduced to the jury, tending to show improper and criminal relations to have existed for some time previous to the shooting, between Martin and the wife of McMillan, and that when the defendant came to offer his evidence, the court refused to allow him to offer testimony tending to prove that for years before this, the character and reputation of Mrs. McMillan as a pure and virtuous woman was above reproach, the defendant having been allowed to offer his evidence in direct denial of any such alleged criminal intimacy.

We are of the opinion that the court did not err in admitting the evidence tending to show the relations between Martin and Mrs. McMillan. If the claims of the state were well founded, such proof might be of value in throwing light upon the motives which actuated Martin in shooting McMillan, and such evidence of motive on his part was admissible in a case where he was charged with murder in the first degree.

On the other hand, where the evidence tending to prove such improper intimacy was perhaps wholly circumstantial,

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why was it not competent for the defendant to prove in the way sought, that it could not be so, or that the great probability, owing to the character or standing of one of the parties, was that it was improbable that such was the case. As stated in Stephens' Digest of Evidence, chapter II, article 2:

“Evidence may be given in any action of the existence or non-existence of any fact in issue, and any fact relevant to any fact in issue, and of no others.”

The motive of the defendant in shooting the deceased was one of the facts in issue in this case, and therefore, if evidence as to the existence or non-existence of that motive was competent and was offered, then any fact, relevant to that fact in issue, was competent. And we think, evidence as to the general character and reputation of Mrs. McMillan was of that kind. In 129 Mass., 474, it was held:

“That on a trial of an indictment for adultery, evidence of the reputation as to chastity of the woman with whom the defendant is charged to have committed adultery, is competent”.

This case, we think, is directly in point, and we hold that the court erred in excluding such evidence.

After the evidence was all introduced, and before argument to the jury, the counsel for the state asked the court to give to the jury seventeen separate special charges in writing, then submitted. To the giving of each and all of which the defendant objected, and thereupon the defendant asked the court to give to the jury forty-eight special charges in writing, then submitted, and the state objected to the giving of each of said special charges, and then argument was had as to said charges, and at the conclusion thereof the court gave to the jury fifteen of the special charges asked on behalf of the state, and to the giving of each of the same the defendant excepted. And the court then gave to the jury thirty-seven of the special charges



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asked by the defendant, and refused to give eleven thereof, to which refusal as to each, the defendant excepted. All the charges given and refused are set forth in the bill of exceptions. On this the case was argued to the jury, and the court then charged the jury; which was in writing, and a copy of which is set forth in the bill of exceptions, with the many specific exceptions taken thereto by the counsel for the defendant, there being seventy-seven of these exceptions.

Those special charges asked for, and given or refused, and the general charge of the court, with the exceptions thereto, occupy one hundred pages of the bill of exceptions. It is out of the question therefore, that we should undertake to pass in detail on the questions thus raised. We deem it sufficient to briefly consider those which counsel seem to have deemed of importance, or which seem so to us; and we think that very many of the charges given for the State and excepted to, present the same general question, and very many of them which relate to murder in the first or second degree, are not now important, as the jury returned a verdict finding that the defendant was not guilty of either.

One of the questions most earnestly debated by counsel in this case, is raised by the language of several of the special charges given by the court to the jury, and also by the language used by the court in the general charge. And this related to the plea interposed by the defendant that he had shot McMillan in the proper and justifiable defense of himself against a violent and felonious attack upon him by said McMillan. It may be that the exact point in controversy may be seen best, by quoting what was said by the Court in its general charge to the jury, on one of the phases of the law of self defense, as follows:

“Again, it must appear that the defendant at the time of firing the fatal shot, in good faith, and in the proper and careful exercise of his faculties, believed, and had reasonable

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ground for believing, that he was in imminent danger of death or great bodily harm from such assault. The mere belief alone, in such danger, is not sufficient to excuse a homicide. He must have arrived at such belief by the careful and reasonable use of his faculties; and further, he must have had reasonable ground for believing the existence of such danger, *such grounds as would cause a man of ordinary courage to so believe.* You are to determine not only whether he entertained such belief in good faith, but also whether his conclusion was, under all the circumstances, a reasonable one for him to arrive at. The reasonableness or unreasonableness of his conclusion is to be judged by placing yourself as nearly as possible in his position at the fatal moment, with such information as he had concerning the disposition of his assailant toward him, and subject to whatever influence the evidence may show was operating upon his mind. In determining whether he had such reasonable grounds, you must take into account the nature of the attack made upon him, the apparent power to prevent the same; the relations existing between himself and deceased, and his own knowledge of his assailant having threatened to take his life and had assaulted him, (if such is the fact), and all the other circumstances of the occasion. If he in good faith believed, upon grounds reasonable under the circumstances that he was in such danger, then he had the right to act as if such danger existed, notwithstanding the fact that he may have been mistaken, and that subsequent investigation may show that there was no such danger."

We may say that in our judgment, the foregoing extract from the charge of the court, leaving out of view the line which we have italicised, (and which evidently was interlined in the typewritten charge prepared for the jury and after its preparation), seems to be in entire accord with the decisions of our Supreme Court on this question, and of our own view of the law.

But the controversy which arises on this point is whether the introduction into this charge of these words: "Such grounds as would cause a man of ordinary courage to believe", or words conveying substantially the same idea, would

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make the charge erroneous. That is, must a defendant in a case of this kind make it appear, that in the careful and proper use of his faculties he not only honestly believed that it was necessary to take the life of his assailant making a felonious attack upon him, to protect his own life or prevent great personal harm to himself, and have reasonable grounds for such belief, *but in addition thereto show*, that the grounds of such belief were such as would cause *a man of ordinary courage to so believe*? This also was substantially the requirement laid down by the court in this case in the special charges given to the jury at the request of the counsel for the state, Nos. 2, 11, 15, and 17.

So far as we can gather from the adjudications of courts there is considerable conflict of opinion as to this point, viz: that conceding it to be true that a person seeking to justify himself for taking life in the defense of himself against a felonious assault, must show that he honestly believes that it was necessary for him to do so, and that he had reasonable grounds to so believe, is it the law that if he does so believe, and the circumstances show that taking him as he was, he had good cause to believe it was necessary for him to do as he did, should he go acquit; or is the jury, notwithstanding they are convinced that he honestly believed his act to be necessary, and that to a man in his circumstances his act seemed to be reasonable, that they can properly find that such belief was not reasonable in fact and convict him?

So far as we know or have seen, this exact question has not been passed upon by the supreme court of this state. *Marts v. The State*, 26 Ohio St., 162, is perhaps the leading case on the subject of self defense, and in that case it is held that:

"Homicide is justifiable on the ground of self-defense, when the slayer, in the careful and proper use of his faculties, bona fide believes and has reasonable ground to believe

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that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger.''

It seems to us that this comes very close to the view entertained by those, who adopt the idea that when the person assailed honestly believes that it is necessary for him to take the life of his assailant to protect his own, and the circumstances are such as to reasonably lead him to so believe, that he should go acquit. For it is expressly stated, that the danger must not necessarily be real, but only apparent; for it is said that he is under such circumstances justified in taking the life of the assailant, though in fact he is mistaken as to the existence or imminence of the danger. It is true that the part of the syllabus quoted is, that to justify the homicide, there must not only be the honest belief of its necessity, but that he must also have reasonable grounds to believe it. And there is good ground for argument that it was the meaning of the court, that the question whether there was reasonable ground for the defendant honestly to believe that, was of necessity to be submitted to and determined by the jury. And this view seems to be strengthened by the decision in the case of Darling v. Williams, 35 Ohio St, 58, where it is held that:

“Homicide is not excusable on the ground of self-defense, although the slayer believes in good faith that he is in imminent danger of death, or great bodily harm, and that his only means of escape from such danger consists in taking the life of the assailant, unless there are reasonable grounds for such belief”

And in the decision of the case, Judge Boynton uses language which shows that in his view, the party who sets up the plea, is not the sole judge, whether he had reasonable ground to believe that the act of killing was necessary to protect his own life.

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This question is discussed ably and at length by Mr. Wharton in his works on Homicide, under the title, "Self-defense", in section 493 and post. In section 493, he says:

"Whether the danger is apparent, is to be determined from the defendant's stand-point. Here no doubt, we arrive at a point where begin marked divergences of judicial sentiment. It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable and actual. But apparently as to whom? Here three theories meet us. The first is, that the standpoint is that of the jury. No doubt in a primary sense this is correct. The jury must judge whether the danger was apparent, but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they finally deliberate on the case. If this were true, an unloaded pistol would cease to be an apparent danger; for the jury when they come to decide the case know that the pistol was unloaded, and know that there was no real danger. However, what the jury have to decide is, not whether the danger was apparent to themselves, but whether it was apparent by some other standard—what is the other standard which the jury are thus to apply?"

After stating the answer given by several courts to this inquiry to be, "that if a reasonable man would have held that the danger was apparent, then the danger will be treated as apparent", and on account of the ambiguity of the authority cited to maintain it, he gives other authorities maintaining the view, "that the danger must be apparent to the defendant, and that it is sufficient if it be so", or, as stated in a case decided by Baron Park: "The rule of law founded in justice and reason is, the guilt of the accused must depend upon the circumstances as they appear to him"; and quite a number of authorities are cited as sustaining this view, and which they seem clearly to do. ■ And the conclusion reached by Mr. Wharton is that, both on principle and authority, the latter view is the correct one.

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And Mr. Bishop, in his work on Criminal Law, states the doctrine on this point thus (vol. 1, sec. 305):

“In self-defense—if in language not uncommon in the cases, one has reasonable cause to believe, the existence of facts which will justify a killing—or in terms more nearly in accord with the principle upon which the rule is founded, if without fault or carelessness he does believe in it, he is legally guiltless of the homicide; though he mistook the facts, and so the life of an innocent person is unfortunately extinguished. In other words, and with reference to the right of self-defense and the not quite harmonious authorities, it is the doctrine of reason, and sufficiently sustained in adjudication, that notwithstanding some decisions, apparently adverse, wherever a man undertakes self-defense, he is justified in acting on the facts as they appear to him. If without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he thus supposes the facts to be, the law will not punish him, though they are in truth otherwise, and he really has no occasion for the extreme measure.”

Our own opinions on this question are fully in accord with those quotations from the works of those two authors. We esteem it to be the correct, as well as the only safe doctrine. The jury of course is to decide from all the evidence, whether the defendant honestly believed in the existence of the danger to himself, and the necessity of taking life to protect his own. But they are to look at the case from the standpoint of the defendant himself, and determine under the circumstances surrounding him, of stress or excitement it may be, whether, without fault or carelessness on his part, he did honestly believe that he was in imminent danger of losing his life, or receiving other grievous personal injury, and to prevent this it was necessary to take the life of his assailant. If they find such to be the case, the law will not punish him. The charges of the court then, that to make out a case of self-defense, it must appear to the jury that the defendant not only in the proper and careful exercise of

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his faculties believed in the existence of such danger, and such necessity, but in addition that he must have had such grounds as would cause a man of "ordinary courage" or of "ordinary firmness", or "an ordinarily courageous man" to so believe, we think were erroneous. This is imposing upon the defendant in a case of this kind a burden, for which we see no warrant in any decision in this state, and is opposed, as we think, to the great weight of authority. How is the defendant in his stress or excitement in which he probably would be, to know or judge how a man of ordinary courage would act if in his place, or how is the jury to know of this? We therefore are of the opinion that the trial court erred in those charges before numbered, and in the use of the language referred to in the general charge, and in refusing to give the special instructions asked by the defendant on this point, if in other respects they were right. But we have not deemed it necessary to be more explicit as to this, or to go into a critical examination of the correctness of the many other charges given on behalf of the state and excepted to, or of those asked by the defendant and refused. Several of these last seem to us to be correct, but were substantially given in the general charge.

Finally it is claimed that the verdict of the jury was manifestly against the weight of the evidence, and that the trial court erred in refusing to grant a new trial asked for on this ground. It is sufficient for us to say on this point, that in our judgment there was evidence on the part of the state, which, if believed by the jury, would probably have warranted them in finding as they did. Certainly there was evidence on the other side, which, if true, would tend very strongly to show that the defendant was only properly defending himself against the violent assault made upon him by a man who for weeks before had been threatening to

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kill him, and that the defendant did honestly believe, and had reasonable ground to believe, that what he did was for the preservation of his own life. But the weight and credibility of all of this evidence was for the jury to pass upon, and unless this verdict was clearly and manifestly wrong, we ought not under the well settled rules of the law to interfere with it.

But for the reasons hereinbefore specially stated, the judgment will be reversed and a new trial awarded.

*C. H. Blackburn, Hayes & Swaim, E. J. West,* for Plaintiff in Error.

*W. H. Hartman, W. W. Savage, and Clive Slone* for Defendant in Error.

(Third Circuit—Logan Co., O., Circuit Court—Oct. Term, 1898.)

Before Day, Price and Norris, JJ.

THE C., C., C. & ST. L. RY. CO. v. COMMISSIONERS OF  
LOGAN COUNTY, AUDITOR, et al.

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*Ditch—Grossly unjust assessment—Injunction proper remedy—*

- (1). By the provisions of section 4491, R. S., an action is authorized, and may be maintained to enjoin the placing upon duplicate and collection of an assessment made to pay the cost and expense of locating and constructing a ditch improvement, on the single ground of gross injustice in the apportionment; and if the fact of gross injustice is established on the trial, the plaintiff is entitled to relief by injunction.

*Same—Assessment of party disturbing natural drainage—*

- (2). On the trial of such issue, evidence tending to show that plaintiff wrongfully erected obstructions and destroyed the natural drainage, and thereby created the necessity for better drainage and increased the cost and expense of securing it, is competent as bearing on the question of gross injustice in the apportionment of such cost and expense.

*Excessive assessment between parties benefited—Remedy—*

- 3). If, upon such trial, it is established that plaintiff derives a substantial benefit from the improvement, it is not a gross injustice to apportion some part of the necessary cost and expense



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of the improvement to the plaintiff. When substantial benefit is made to appear, the remedial right changes, and it becomes a proposition, not of gross injustice, but of equitable apportionment between persons mutually benefited; and in such case the party must pursue such remedy as is provided for by law, and is not entitled to the extraordinary remedy of injunction.

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Appeal from the Court of Common Pleas of Logan county.

DAY, J.

The purpose of the action is to enjoin the location and construction of the so-called "Ward Ditch", and the placing on the duplicate for collection of an assessment ordered to pay for the labor and expense of locating and constructing said ditch. A perpetual injunction is prayed. The right to this relief, is based solely on the grounds that the proceeding for the location of the ditch was and is illegal, and that the plaintiff is not at all benefited by it, so that to enforce the order and the assessment reported, as to it, would be a gross injustice. No error or irregularity in the proceedings to locate and establish and construct the ditch is claimed or insisted on. It is practically conceded that, in respect to the proceedings for the location, they were distressingly correct and free of even technical error; and only the claim is asserted and relied on that to enforce the result of the proceeding, and the assessment apportioned to plaintiff, would, in and of itself, be illegal and a gross injustice, on the theory that plaintiff derives no benefit whatever from the proposed improvement. The plaintiff's entire case is put in issue by an answer, in form a general denial of the averments of the petition.

The plaintiff appeals to the broad and equitable provisions of section 4491, Revised Statutes, and basing its entire case thereon, prays relief in accordance with its provisions. We think the appeal is well based and must be allowed, and the contention of the parties disposed of under the provisions of that section. The provisions of that section, re-

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lied on by plaintiff as authorizing its action, are as follows: Section 4491, Revised Statutes:

“The court in which any proceeding is brought to recover any tax or assessment paid, or to declare void the proceeding to locate or establish any ditch, or to enjoin any tax or assessment levied or ordered to be levied to pay for the labor and expense aforesaid, shall, if there is manifest error in the proceedings, allow the plaintiff in the action to show that he has been injured thereby, \* \* \* and without finding error, the court may correct any gross injustice in the apportionment, made by the commissioners; the court shall, on final hearing, make such order in the premises as shall be just and equitable, etc.”

The section invites the plaintiff's action, and clearly authorizes relief under two heads: viz, in case of manifest error in the proceeding, with an affirmative showing of injury; and, without finding error, in case of any gross injustice in the apportionment of the cost and expense. Nor are the remedies here provided, or rather permitted, anything new in our jurisprudence. Additional authority is not conferred, by the provisions of the section, upon the courts; but it only puts in form of statutory law, and brings into our drainage statutes, and makes available in ditch proceedings, rules that have, from time immemorial, obtained in courts of equity. Yet the provisions of the section are valuable in drainage matters, as they somewhat modify the prohibitory provisions of the next preceding section, 4490, and may be regarded and accepted as express legislative sanction, permitting the courts to dispense partial justice, even in a ditch proceeding, by correcting and relieving against gross injustice, without being obliged to first find the proceedings irregular or erroneous. In the absence of both the enumerated grounds, however, manifest error with injury, and gross injustice, no relief is provided, and, of course, none can be afforded in this form of action.

The plaintiff did not show, or attempt to show, manifest

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error in the proceeding, but confined its efforts to the task of demonstrating that there was gross injustice in the apportionment of the expense of the improvement; thus raising and presenting for decision the single proposition: Was the apportionment of the cost and expense of the improvement, as made by the commissioners, grossly unjust to the plaintiff? The affirmative of the proposition is with plaintiff, and to entitle it to prevail, it must meet the requirements of its position and sustain its contention by a preponderance of all the evidence. The plaintiff's efforts were all directed to the establishing of the fact that its property, the railroad bed and track, would not be at all benefited by the construction of the improvement, but on the contrary would suffer damage; and the trend of all its testimony was to that effect. It was shown that the plaintiff company is assessed for the improvement, in round numbers, one hundred and sixty dollars. Four persons only are reported as benefited, and the sum apportioned to plaintiff, is about one-third of the whole amount. In all this plaintiff proceeds on the theory, that if a large portion of the cost and expense of the ditch is assessed and apportioned to it, and it is not to any extent benefited by the making of the improvement, the apportionment must of necessity be a grossly unjust one. In an ordinary case, where relative benefits, only, are in question, the theory of plaintiff, is most likely correct; and upon such situation being made to appear satisfactorily, the proper relief to be administered would be clearly indicated. The right to such relief, however, is based altogether on the assumed fact, that there is substantially an entire absence of any benefit whatever inuring to the plaintiff from the improvement; and if it shall appear from a consideration of all the evidence, that there was some substantial benefit to the plaintiff company, resulting from the construction of the improvement, so that plaintiff was properly assessed in some amount for the pay-

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ment of the expense of its construction, unless the benefit shown appears to be so infinitesimal and trifling and the assessment so large, that the disparity between the two, *prima facie*, evidences wrong and injustice, plaintiff has failed to sustain its contention, and the finding and judgment must be against it. In such case the question ceases to be one of "gross injustice in the apportionment," and becomes the ordinary one of, is the apportionment fair and equal; and that question is conclusively presumed to have been properly adjudicated and settled in the original proceeding for the establishment of the improvement, to which the plaintiff was a party. It is only gross injustice in the apportionment that can be corrected and relieved against in this form of action. An apportionment somewhat unequal, perhaps believed to be somewhat unjust, viewed alone in the light of relative benefits to be derived, would not supply the situation described in the section, or authorize the relief therein pointed out, viz: the correction of a gross injustice in the apportionment. In such case the situation would be that of an apportionment believed to be unequal and not entirely equitable, in which the party feeling aggrieved, would have a complete and adequate remedy at law, by appeal or error; and would be denied the extraordinary remedy of injunction. See *Haff v. Fuller*, 45 Ohio St., 495; *Laylin v. Commissioners*, 46 Ohio St., 663.

The evidence bearing on the proposition involved in the case, was directly conflicting. Witnesses called and examined by plaintiff, with one exception, testified that the plaintiff's railroad property was not benefited, in the least, by the improvement; while witnesses on behalf of the defense, including one introduced by plaintiff, gave evidence that the railroad embankment and road bed, was certainly and most directly benefited. The weight of this evidence is, we think, to the effect that the road is benefited to an extent—the precise or proximate extent was not developed, but

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sufficiently so to satisfy the court that it is not a question of gross injustice at all, but only a contention between several mutually benefited parties, as to whether the cost and expense of creating the benefits, is fairly and equitably apportioned between them.

Thus far we have dealt with the case altogether from the point of view urged by plaintiff, and have endeavored to make proper disposition of it on the plaintiff's theory alone.

We think, however, the case is broader than plaintiff is willing to concede, and has in it some material facts not commonly found in an ordinary ditch proceeding; material and unusual facts, that seriously affect the relative position of the parties to be charged with the cost and expense of making the necessary improvement in the drainage of their respective premises, and which are peculiarly pertinent, and not to be left out of consideration, especially as bearing on the question of gross injustice in the apportionment. In considering and determining the proposition, if a gross wrong or injustice has been done or is proposed, we are not of opinion that we are limited and confined to the evidence, alone, concerning the relative benefits resulting to each party, but may also, with entire propriety, receive and consider as competent, any evidence tending to show that an increased necessity for the improvement, and as well, a largely increased cost and expense of making it, was in some part occasioned and made necessary by the improvident or wrong acts and conduct of one of the parties, in improperly and purposely obstructing the natural flow of the water; and also all other relevant and pertinent facts and circumstances, having a bearing and tending to throw light on the proposition of wrong and absolute injustice. When the inquiry is thus enlarged and extended to cover the whole ground, with all the pertinent facts considered, so as to correctly ascertain the relation and position each party sustains to the needed improvement in drainage, the

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cost and expense of it, the resulting benefits and the equitable apportionment of such cost and expense between the interested parties, it appears, as the undisputed fact, that the tract of country to be drained by the improvement in question, was, in its primal condition, a low swampy marsh, with a slight but distinct fall to the southwest, in which direction its waters naturally flowed, finding an outlet into Blue Jacket creek. Plaintiff's railroad was constructed directly across the swamp, dividing it and leaving a portion on the north side of the railroad. This railroad was gradually converted into a solid embankment by being filled in, from time to time, with earth, timbers, gravel, etc., until, with the exception of an open culvert, some five or more feet in width, near the point where the present ditch is to pass through the said embankment, a complete and substantial dam was created, preventing the flow of the waters of the north part of the swamp to their outlet, except through the small culvert just named. Five or six years ago, this culvert was filled and entirely closed by the plaintiff company, and the dam, so far as the plaintiff is concerned, was made absolutely complete. Prior to this, water having a natural outlet elsewhere, was, by the plaintiff company, diverted from its natural course, and carried into the swamp on the north side of the railroad, and was by the making of the solid embankment, left, with all the other water naturally collected there, without outlet or means of escape, except by the slow process of evaporation. Much of the necessity for the improvement, and very much of the total expense of the improvement, was directly occasioned by the obstruction to the natural flow of the water perpetrated by the plaintiff; and in view of that fact, the suggestion naturally presents itself: Is it in the nature of a gross injustice, that the plaintiff company, in a strictly regular and lawful proceeding, is required to bear a large share of the expense necessarily incurred in removing the obstruc-

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First National Bank of Toledo v. Central Chandelier Co. et al.

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tion to the natural flow of the water, created by itself, and in rebuilding a proper and sufficient outlet for the dammed waters of the swamp. It does not look wrong—certainly it is not gross injustice, to require the plaintiff to sustain a portion of the burden of righting a wrong by it perpetrated against the public and the petitioners for the ditch, in the creation of the dam, and the diverting of the water from its natural course.

We do not perceive any gross injustice, or any kind of injustice, in the matter, and the prayer of the petition is denied, at costs to the plaintiff.

*West & West, and Judge Dye, for Plaintiff.*

*S. H. West, for Defendants.*

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before King, Haynes and Parker, JJ.

THE FIRST NATIONAL BANK OF TOLEDO v. THE CENTRAL CHANDELIER CO. et al.

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*Evidence—Oral declarations of parties to written instrument before execution—Admissibility—*

- (1). Oral declarations of the parties to a written instrument made on or before the execution of the same, are not admissible in evidence to show an intention or purpose not therein expressed, although the ambiguity in the instrument may make the purposes or intentions of the parties uncertain.

*Same—Title to property—Conveyance or pledge—Admissibility of oral declarations—Writing explaining character of written instrument—Admissibility of oral declarations to further qualify—*

- (2). Where a transaction affecting title to property evidenced by a written instrument is under investigation in a court of equity, and the question to be determined is whether an unconditional conveyance of the title or a mortgage or pledge to secure a loan was intended, evidence of oral agreements and conversations of the parties prior to and contemporaneous with the execution of the instrument will be admitted for the purpose of determining the true character of the transaction. But *quaere*, where the instrument is accompanied by a writing, which has no mark

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of incompleteness, but seems to give a full record of the transaction and the terms upon which the property conveyed in the instrument should be held by the transferee or redeemed by the transferer—will oral evidence be admitted also tending to show a different intent than that expressed therein?

*Promise—Express promise to repay money—*

- (3). To constitute a transfer of property, absolute on its face, a pledge merely, it is not necessary that an express promise on the part of the transferer to repay the money should appear.

*Conveyance or pledge—*

- (4). Facts under which a transfer of stock, absolute on its face, was held to be a pledge of the same merely.

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PARKER, J.

There are a great many parties defendant in this case, and among them are F. P. Chaplin and Armina D. Isherwood. A part of the purpose of the action is to determine the ownership of stock in the Central Chandelier Company and enforce the statutory liability of stockholders. The issue which is presented to us here is between F. P. Chapin and Mrs. Armina D. Isherwood, and the stock in question about which these issues of ownership and liability arise consists of twenty-five shares of the stock of defendant company amounting to \$2,500.

It is conceded that the stock certificates for these twenty-five shares of stock were issued originally to Mr. Chapin. They consist of three certificates: two for ten shares each and one for five shares, issued prior to the 3d day of May, 1893, and it is conceded that Chapin owned this stock up to that date. Chapin avers that he then sold and transferred the same to F. P. Isherwood, from whom Armina D. Isherwood derived whatever title she may have as residuary legatee of his estate under his will. Mrs. Isherwood contends that the stock was not sold to Mr. Isherwood, but was pledged to him to secure a loan of \$2,500 which he made to Chapin on the date of the transfer, viz., May 3, 1893. It has been determined in Ohio that a pledgee of



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stock is not bound by the statutory liability. The assignments on the back of these certificates are signed by F. P. Chapin; there is a blank form and a space left for the name of the transferee and spaces left for the dates, etc., which were not filled in; it appears that they were never filled up, and that no transfer was ever entered on the books of the Central Chandelier Company.

Contemporaneously with the execution of these blank assignments, and as a part of that same transaction, a certain paper was executed in duplicate by the parties, one copy of which was held by Chapin and the other by Isherwood, the latter being attached to the stock certificates and placed by Mr. Isherwood among his effects, where it was found by his executors. The exact scope and meaning of this paper it is somewhat difficult to determine from its terms alone. It is contended on behalf of Chapin that it clearly imports a sale with a conditional right or option of re-purchase reserved. On the part of Mrs. Isherwood it is contended that it shows, if not clearly, yet sufficiently, that the stock was placed in pledge to secure a loan of \$2,500. It is conceded by both that upon the transfer of the stock Mr. Isherwood let Mr. Chapin have \$2,500. This instrument is written upon a letter-head of the Bee Company, in which Mr. Chapin at that time had an interest and of which he seems to have been manager. The paper was prepared by Mr. Chapin with the assistance of a friend. Mr. Isherwood appears to have had no part in that. Omitting the heading of the Bee Company, it reads as follows:

"Toledo, Ohio, May 6, 1893.

"For and in consideration of \$2,500 paid to me this day by F. P. Isherwood I have assigned and do transfer to him 25 shares of stock in the Central Chandelier Company amounting to \$2,500, full paid and non-assessable, and on which I guarantee that he shall receive at least 6 per cent. per annum payable annually.

"F. P. Isherwood agrees to allow said Chapin to have

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the option of redeeming said stock when he can do so, by refunding the amount of \$2,500 to said Isherwood with interest.

“F. P. Chapin,  
“F. P. Isherwood.”

The words “payable annually” were added at the instance of Mr. Isherwood; the remainder of the paper is typewritten, and the words just mentioned were written in by Mr. Chapin.

On the part of Mrs. Isherwood parol evidence was introduced on the hearing of conversations between Mr. Isherwood and Mr. Chapin at the time of the execution of these papers and blank assignments and of the turning over of the stock to Isherwood by Chapin. Some parts of these conversations are testified to by her as having transpired prior to the execution of the papers, and some as having taken place subsequently thereto, but all on the same day and as a part of the same transaction. Some of these conversations as testified to related to the terms upon which the money was to be exchanged for the stock, and tend to show that the money was loaned and the stock taken in pledge as security for the re-payment of the loan with interest.

Other parol evidence was introduced on behalf of Mrs. Isherwood of subsequent declarations and transactions on the part of Chapin, tending to show that he regarded the transaction as a loan with stock placed in pledge as security, and that he claimed to be the owner of the stock after the transfer referred to. The introduction of this oral evidence was objected to by Chapin, and at the close of the testimony he moved that it be stricken out and disregarded. We shall now pass upon this motion. Counsel for Mrs. Isherwood contends that this oral evidence is admissible on various grounds. First, that it is admissible because there is an ambiguity in the writing which may be cleared up by such oral proof under the rules relating to that subject; that the contract is so unskillfully drawn as to render the meaning

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or intention of the parties obscure and doubtful, and that this evidence is admissible to show the surrounding circumstances so that thereby the court may be aided in putting a construction upon the instrument.

We conclude that the evidence of oral declarations of the parties to these instruments, made at or before their execution, is not admissible for the purpose of showing an intention or purpose not therein expressed, though ambiguity in the instrument may make the purposes or intentions of the parties uncertain. We also conclude that it is not admissible on the ground that it may put the court in possession of facts that will aid it in the construction of the instrument. We think that is settled in the case of *Tuttle v. Burgett's Adm'r.*, 53 Ohio St., 498, and by many other decisions. I will read the fourth syllabus in this case:

“The oral declarations of a party to a written instrument, made before or at the time of its execution, of an intention or purpose not therein expressed, or different from that to be derived from its terms, are not within the rule which permits extrinsic evidence of the situation of the parties and of the surrounding circumstances when the instrument was executed, and are inadmissible in an action on the instrument where its reformation is not sought.”

I may say that here there is no prayer for reformation, and no facts stated in the pleadings such as afford grounds for reformation—no allegation of fraud or mistake in the preparation of the instrument or reduction of the agreement to writing; nor is there any allegation that on account of the mutual confidence reposed by the parties in one another any part of the agreement was not reduced to writing. The author of *Jones on Mortgages*, in the course of his discussion of the law relating to the admission of parol evidence at law and in equity to show that a deed absolute on its face is in fact a mortgage, makes this statement: (I read the closing paragraph of section 282).

“Parol evidence is admissible in equity to show that a

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deed absolute in form is in fact a mortgage, not because the rules of evidence are different in equity from what they are at law, but because the jurisdiction and power of the courts with reference to dealing with the facts presented are different. The rules of evidence are the same in both courts."

From this it would seem that even if reformation need not be prayed for, allegations should be made of facts warranting the interposition of a court of equity on some one of the well-established grounds upon which such courts proceed in going behind written contracts.

It is contended that this evidence is admissible on the independent ground that, where a transaction affecting the title to real or other property, evidenced by a deed or other written instrument, is under investigation in a court of equity, and the question to be determined is whether an unconditional conveyance or transfer of title, or a mortgage or pledge to secure a loan was intended, the court will admit evidence of the oral agreements and conversations of the parties prior to and contemporaneously with the execution of the written instrument, though varying or contracting the terms thereof, for the purpose of determining the true character of the transaction. A majority of the court are of the opinion that the testimony of Mrs. Isherwood as to the conversations between Mr. Isherwood and Mr. Chapin before and at the time of the execution of these instruments is admissible under the rules and authorities relating to this subject.

I cannot reconcile my mind to this view, though I concurred therein with my brethren at the time the testimony was received. It is clear that a deed absolute upon its face may be shown by oral evidence to be a mortgage; but a deed is an instrument whereby title is conveyed; it usually has but few of the elements or terms of an executory agreement — often it has none. Such terms or elements are not necessary to its

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completeness as an instrument of conveyance. Evidence of contemporaneous agreements may be admitted in most cases on the ground that the deed does not purport, either expressly or by necessary implication, to give the whole record of the transaction or the terms of the agreement as to events to transpire in the future. The rule as to showing that there was a contemporaneous transaction and agreement which had the effect of converting the deed into a mortgage, might be applied to the assignment of these stock certificates if there were no other written evidence of the agreement, though I doubt if these rules are applicable to transactions of this character at all. But here we have an independent writing which bears no mark of incompleteness, but seems to contain a full record of the transaction and the terms upon which the stock might be held by the transferee or redeemed by the transferer. To receive evidence of prior and contemporaneous conversations between the parties to this instrument, tending to show a different intent or purpose than that expressed therein, and tending to contradict the writing and import into it distinctly new terms, seems to me to violate the plain and well settled rules of law upon this subject. Yet I am bound to say that a careful reading of the authorities, (and we have examined those cited by counsel, and many others in addition thereto), has shaken my faith somewhat in this position, though they leave me unconvinced that I am wrong.

I call attention especially to the case of *Slutz v. Desenberg et al.* reported in the 28 Ohio St., 371. In that case a deed in the usual form was executed and delivered and the grantee took possession under it. At the same time and as a part of the same transaction an article of agreement was prepared and signed by the parties, as to the proper construction of which they afterwards differed. An action was instituted to redeem. The deed and this article of agreement—which appears to be complete and to set

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forth all the terms of the agreement of the parties—were introduced in evidence, but in addition thereto oral evidence was admitted of the conversations and declarations of the parties with respect to this transaction both prior to and contemporaneously with the execution of the writings. In the course of his opinion Judge Ashburn says—at page 378:

“The course of decisions in this class of cases indicates that courts are vigilant to discover whether a condition of defeasance in law or fact attaches to the deed absolute in form. To this end they scrutinize the prior pecuniary relations of the parties, each towards the other; contemporaneous acts bearing on the question; all after acts and admissions of the parties that are competent to be considered as evidence in relation to the transaction; any material inadequacy of consideration, and the terms of any written agreement entered into by the parties.

“This brings us to a consideration of the facts of this case as presented by the bill of exceptions, and an application of the legal principles we have been considering. It is proper to say that parol evidence may be received and considered, as tending to show the intention of the parties and the true character of the transaction.”

He then proceeds to discuss the matter as to the written agreement, and in that case, as I have pointed out—there was not only a deed absolute upon its face, but a written agreement between the parties which seemed to set forth completely the terms of the arrangement, and the oral evidence admitted was of the character that I have indicated; so that in that case, the admission of oral evidence seems to have received the approval of the court, though it will be noted, upon examining the case, that nothing is said upon this point in the syllabus, and there appears to have been no question raised or made upon the trial of the case, or upon the submission of it to the supreme court, as to the admissibility of this oral evidence, so that it may be that we would be justified in treating this

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as *obiter dictum*. The case just cited seems to me to go farther in that direction than any other authority that has been brought to our attention. It is said that this rule owes its origin to the tender regard of courts of equity for the rights of the borrower; that they are inclined to discover and protect a defeasance and right to redeem whether written expressly in an instrument or discovered otherwise. The rule is not invoked here by the one who is said to be the borrower; but we conclude that to the extent the rule has been established it may be invoked and given application at the instance of either the borrower or lender, either the grantor or the grantee, and that it is not a rule with which the borrower may play fast and loose, using it when it seems to him to be advantageous so to do and objecting to its use when its use may be to his disadvantage.

As to the admissibility of evidence relating to the relations of the parties and their contemporaneous acts as distinguished from their utterances bearing upon the transaction, and as to all subsequent acts and admissions, we none of us entertain any doubt. The motion to exclude will therefore be overruled as to all the evidence received over objection. Upon the whole evidence we have arrived at the conclusion that this stock was not purchased by Mr. Isherwood, but was pledged to him as claimed by Mrs. Isherwood. We think we should have arrived at this view without the aid of the testimony as to prior and contemporaneous conversations between Mr. Isherwood and Mr. Chapin; that the other testimony indicates a loan and a pledge rather than a sale with a right to redeem. And that this was the purpose and intent of the parties, we think was made clear by their subsequent conduct with respect to this stock and their subsequent declarations upon the subject; but since we cannot be sure that our minds have not been biased and inclined to this construction by this oral evidence, we deem it only fair and proper to rule that

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x it shall be retained for consideration. The criterion upon which it shall be determined whether this is a conditional sale, as contended by the one party, or a pledge, as contended by the other, is laid down in this case to which I have already referred—*Slutz v. Desenburg et al.* I need read no more than a part of the syllabi:

“A deed absolute in form, if intended to secure the payment of money, and the relation of debtor and creditor exists between the grantor and the grantee at the time of its execution, will be treated as a mortgage. But where no such relation exists, and the grantor and grantee, at the time of the execution of the deed, agree in writing that the grantor shall have the option to re-purchase in a given time, at a certain price, the transaction is a conditional sale.”

There are illustrations of the application of this rule in the cases cited in the opinion. Looking at the assignments we find them, as I have said, in blank. This affords some negative evidence that Mr. Isherwood did not expect to be invested with a full legal title, and, taken in connection with the fact that he never had the blanks filled with his name, and never took any other action towards putting himself in position to exercise or toward exercising the rights of an owner of the stock, or in the direction of the affairs of the company, it affords somewhat persuasive evidence that he did not regard himself as the owner of the stock. On the other hand the voting of the stock from time to time by Mr. Chapin, without, so far as the evidence discloses, consulting with Mr. Isherwood, or seeking any authority from him to do so, indicates, we think, very strongly that Mr. Chapin regarded the stock as his own, subject only to the rights of Mr. Isherwood as pledgee. The provision in the contract whereby Chapin guarantees to Isherwood a dividend of not less than six per cent, payable annually, we regard as a stipulation for the payment annually for the use of that money; it amounts to a promise that six per cent interest shall be paid



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annually on the \$2,500; and that the parties so regarded it is shown by the subsequent payment by Chapin to Isherwood of what Chapin calls "interest" when he comes to give his testimony upon that subject.

In section 325, Jones on Mortgages, it is said:

"Evidence of the continuance of the debt, such as the payment of interest upon it, or the extension of the time of payment, is generally conclusive of the character of the original transaction as a mortgage."

The clause wherein an option is given to Chapin to "redeem" upon "refunding" the \$2,500 and interest, uses apt words to express a right of redemption. The "option" to redeem amounts to a "right" to redeem, and does not imply an option or right to decline to redeem and thereby acquire rights different from those of debtor and pledgor. The only feature of an ordinary pledge that is lacking is an express promise to repay the \$2,500. As to that I call attention to the case of William Marshall v. Stewart et al., 17 Ohio, 356. The syllabus reads as follows:

"Where land is conveyed by an absolute deed, and the vendee at the same time delivers to the vendor a contract by which he agrees to reconvey the premises by a specified time, upon the re-payment of the purchase money with interest, the circumstances furnish presumptive evidence that the deed, although absolute upon its face, was intended as a mortgage, and it will be so held in equity."

Upon reading this case it will be observed that there, as here, there was no express promise upon the part of the borrower to repay the money — the promise was upon the part of the lender that if the money was repaid with interest he would re-convey. So that the fact that there was no express promise upon the part of the borrower here we do not regard as conclusive upon the rights of the parties; the relation of debtor and creditor lender and borrower existed there, and we find that it existed here, and the law implies a promise to repay

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within a reasonable time. It is sufficient that the money was loaned and the stock pledged, as we find the fact to be, —the time and terms of repayment need not be stated. Perhaps in the case at bar, on account of the provision that Mr. Chapin is to have the privilege of redeeming the stock when he can do so, the rule as to a reasonable time would be modified somewhat by the circumstances of Mr. Chapin —that it amounts to an obligation to pay within a reasonable time, dependent somewhat upon his circumstances. This was a transaction between a nephew and an uncle who appear to have been on very good terms; the uncle appears to have been inclined to help his nephew, so that an arrangement of that kind under the circumstances, is not extraordinary.

The so-called guaranty that the stock is full-paid up and non-assessable, that it amounts to \$2,500, and that the transferee shall receive at least six per cent. per annum, payable annually, amounts to an undertaking that if the stock would not produce par and six per cent. (which it will be seen, would satisfy the debt, the amount of the debt being exactly equal to the amount of the stock), Mr. Chapin would pay the balance. This defines Mr. Isherwood's rights as pledgee and Mr. Chapin's obligation as pledgor, and falls but little short, if it does not quite reach a promise to pay the \$2,500 with interest.

Upon these conclusions as to the facts a judgment will be entered dismissing Mrs. Isherwood with her costs, and against Mr. Chapin for the amount of this stock.

*Smith & Beckwith*, for Plaintiff.

*Doyle & Lewis*, for Defendant Chapin.

*Cummings & Lott*, for Defendant Mrs. Isherwood.

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Marian Sampsell, Adm'r., v. James A. Sampsell.

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(Seventh Circuit—Columbiana Co., O., Circuit Court—January Term, 1899.)

Before Frazier, Burrows and Marvin, JJ.

MARIAN SAMPSELL, Administrator of the Estate of Ira E. Sampsell, deceased, v. JAMES A. SAMPSELL.

*Garnishment of executor as administrator for money coming to legatee admissible—*

- (1). Under sec. 5531, R. S. of Ohio, process of garnishment may be served, in a proper case, upon an executor, or administrator with the will annexed, in a suit brought by a creditor of a legatee under the will, against such legatee, and such service will have the effect to bind such legacy for the payment of the judgment which the plaintiff in attachment shall recover, provided that upon final settlement of the testator's estate there shall be money in the hands of such executor or administrator with which to pay such legacy.

*Same—Effect—*

- (2). Where garnishee process has been served upon an executor or an administrator with the will annexed, in a suit brought against a legatee, and it appears from the answer of the garnishee that, though the estate has not been settled, there will upon settlement, be money in the hands of such executor or administrator with which to pay the legacy, a motion to dissolve the attachment and discharge the garnishee, where the only ground for such motion is that a legacy so held is not subject to garnishment, should be overruled.

MARVIN, J.

This is a proceeding in error brought in this court seeking to reverse the judgment of the court of common pleas.

The facts in the case are, that Marian Sampsell is the administrator of the estate of Ira E. Sampsell, deceased. That Catharine Sampsell and Rebecca C. Miller are administrators with the will annexed of the estate of Abraham S. Sampsell, deceased. The plaintiff in error was the plaintiff in the court of common pleas. She filed her petition claiming a judgment against the defendant on a contract made between her intestate and the defendant. The defendant is a non-resident of Ohio. The plaintiff filed her affidavit sufficient in form, and did all things necessary to entitle

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her to have garnishee process issued against Miller and Sampsell as administrators of the estate of Abraham S. Sampsell, deceased, and such process was issued against these administrators. To the order issued in such process Catharine Sampsell, as one of the administrators of the estate of Abraham S. Sampsell, deceased, made answer, stating that Abraham S. Sampsell died testate; that his will was admitted to probate; a copy of such will is attached to her answer, and made a part of it; that letters of administration with the will annexed were issued to herself and Rebecca C. Miller upon the estate of said deceased; that the debts payable out of the estate, including costs of administration, funeral expenses, and widow's allowance, are unknown, but estimated at \$900.00; that the value of the personal property is not known, but estimated at \$3,000.00; that the value of the real estate, exclusive of certain real estate named in the answer, and which is specifically devised in the will, is estimated at \$300.00; that Catharine Sampsell, the widow of A. S. Sampsell, deceased, is now living, and is about eighty years of age. No account of administration has been filed, and no order of distribution of said estate has been made by the probate court. These garnishees have been sued as such in a case in said common pleas court by the same plaintiff against Homer A. Sampsell.

The will of Abraham S. Sampsell, deceased, so attached to, and made a part of, the answer of the garnishee, among its items, has, as the second item, this:

"I give, devise and bequeath to my beloved wife in lieu of her dower all my property, both personal and real or mixed, remaining after the payment of my debts, to use during her natural life or so long as she remain my widow."

There is no evidence anywhere in the case as to whether the widow elected to accept the provisions of this will or not. In our view of the case, however, the result would not be different whether she elected to take under the will or not.

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The eighth provision of the will is:

"I give to my son James A. Sampsell \$900.00, and to my son Homer A. Sampsell \$800.00."

By a previous item in the will the testator bequeathed to a grandson the sum of \$250.00, and there is a provision also that after the payment of debts and the legacies named, the balance of the property shall be divided equally among four of his children named, including James A. Sampsell, the defendant in this action, and Homer A. Sampsell.

From the answer of the garnishee in connection with the will, it appears that the administrators of the estate of Abraham S. Sampsell have money in their hands in their said trust capacity, which will, at the expiration of the widowhood of the widow of said Abraham, whether such widowhood be determined by death or by marriage, be payable to the defendant. And though there may be a possible doubt as to the amount so to be paid, it is reasonably certain that the condition of the estate, in the hands of these administrators, is such that the entire bequest to James Sampsell of \$900.00 will be paid.

Upon the filing of the answer of the garnishee a motion was filed to dissolve the attachment and discharge the garnishee, and such motion was by order of the court of common pleas sustained. The present proceeding is brought seeking to reverse such order.

The facts being as has been stated, the question presented, is, can this bequest to James A. Sampsell be subjected by garnishee process to the payment of any judgment which the plaintiff may recover in this action.

It is urged in support of the order of the court of common pleas that, attachment being a statutory proceeding unknown to the common law, the remedy thereunder must be pursued strictly. That the proceeding is *in rem* in a case like the present where personal service is not made upon the defendant, so that judgment is good only in so far

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as it can be satisfied out of the property taken. That the jurisdiction of the court extends only to property which has been attached, and authorities are cited in support of each of these propositions. There is no claim, however, in this case, that the proceedings have not, on the part of plaintiff, been in all respects regular and in conformity with the letter of the statute. Section 5530 of the Revised Statutes prescribes in what cases, and against whom, the order of garnishment may be issued, and that section reads:

“When the plaintiff, his agent or attorney, makes oath, in writing, that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession”,—and I emphasize this a little, to show that although the legislature were quite particular to name “person”, and then an artificial person, and a partnership, it forgot it when it got to the last pronoun and said in *his* possession, instead of *his or its*—“describing the same, if the officer cannot get possession of such property, he shall leave with such garnishee a copy of the order of attachment”, etc.

It will be noticed that the order of garnishment may be issued against any person, partnership, or corporation, who has property of the defendant in his possession. Section 5538 provides that:

“An order of attachment shall bind the property attached from the time of service; and the garnishee shall stand liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice mentioned in section fifty-five hundred and thirty.”

The word “due,” as used in this section, clearly means “owing”. The language of the section, as will be noticed, is, “money and credits *due* from him to the defendant”,

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but that it means simply *owing* from him to the defendant is clear, and has been adjudicated in Ohio. See *The Ohio Auxiliary Fire Alarm Co. v. William Heisley, Trustee*, found in the 7 C. C. Rep. 483; and *The City of Newark v. Funk & Bro.*, 15 Ohio St., 462. The court, in the last case named, say: "It must be a subsisting claim, due or to become due." That is, it must be something which is owing. We find no direct adjudication by the supreme court of this state upon the question of whether an administrator or executor may be garnisheed by a creditor of a distributee or a legatee, who will, upon settlement of the decedent's estate, be entitled to receive some part of the funds in the hands of such executor or administrator.

In the case of *Bently & Sons v. C. P. Strathers*, found in the 5 Weekly Law Bulletin, at page 288, it is said by the district court of Trumbull county,

"The plaintiff undertook to garnishee money due the defendant from an administrator before an order of distribution was made.

"This cannot be done, as there is no indebtedness between the administrator and the defendant (who was an heir) until after the order of distribution is made."

No report of the case is made, and nothing is said about it except as above quoted. Whether the court would have made any distinction between the heir of an intestate and a legatee under a will does not appear.

Quite a good many authorities, to which we have given attention, seem to make a distinction between the garnisheeing of an administrator for some debt due from a distributee after the order of distribution is made and a like garnisheeing before such distribution is ordered. It seems a little difficult to understand why such distinction is made, for the order of distribution in this state is simply an order that the administrator pay the balance in his hands to the

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parties entitled by law to receive the same, without determining who the parties are to whom payment is to be made.

In the case of *Flora Arbaugh v. Joseph Myers*, found in the 9 Weekly Law Bulletin, page 64, the court of common pleas of Pickaway county held, that money in the hands of a guardian might be attached for the debt of his ward. This, though not an authority binding on this court, seems to us to be well supported in the reported opinion, and the reasoning surely applies with as much force to a case like the one before us, as to the case then being considered by the court. By Section 5520, as already seen, the process may be issued against any person, corporation, or partnership having property of the defendant in his possession. Under similar statutes it has very generally, perhaps universally, been held that public officers, such as sheriffs, clerks of courts, and the like, could not be held as garnishees, and many similar holdings have been made in reference to executors and administrators, and apparently the reasoning in reference to the latter is the same as in reference to the former. There is a very full discussion of the subject in *Drake on Attachments*, at page 21. In *Brooks v. Cook*, 8 Mass. 246, it is said by the supreme court of that state, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority. To the same effect are *Barnes v. Treat*, 7 Mass. 273; *Wentworth v. Whittemore*, 1 Mass. 472, and other decisions by the same court. At section 477, of *Drake on Attachments*, it is said that the same considerations which forbid garnishment of executors, administrators, and guardians, require that all ministerial officers having official possession of property or money, should be exempt from that proceeding. The proposition, in substance, is that where money or property is held by one under the orders or authority of



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a court whose orders with reference to the disposition of such money or other property the one so holding it is under obligation to obey, it would be an unwarranted interference to allow another court to make an order as to the disposition of the same property. Drake, at section 245, states the proposition that property in the custody of the law cannot be attached, and gives the reasons for the proposition, using this language:

“To allow the course of legal proceedings to be interfered with in such a manner, would, of necessity, greatly protract litigation and produce continual conflict of jurisdiction.”

Our legislature, however, by the enactment of section 5531 of the Revised Statutes, has declared that these reasons are not sufficient, but that sheriffs, coroners, clerks, constables, master commissioners, marshals of municipal corporations, and other officers, shall be subjects of garnishment. The section reads:

“The service of process of garnishment upon the sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation, or other officer having in his possession any money, *claim*, or other property of the defendant, or in which the defendant has an interest, shall bind the same from the time of such service, and shall be a legal excuse to such officers to the extent of the demand of the plaintiff, for not paying such money or delivering such claim or property to the defendant, as by law, or the terms of the process in his hands, he would otherwise be bound to do.”

It is difficult to understand, as is well said in *Arbaugh v. Myers*, *supra*, why, since all persons, corporations, partnerships, and officers, are proper subjects for the service of this writ, there should be held to be an exception as to executors and administrators. The language of section 5530 is broad enough to include them, and although it is probable that they would not be held to be so included in that

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section, we are of the opinion that they are included in section 5531. Certainly they come, as it seems to us, within the spirit and reason of that section. It may be urged that the section should be interpreted as though it read, after the enumeration of the several officers, "or other like officers". And this is doubtless correct. But "like" in what respect? In many respects there is great dissimilarity between the duties of the officers specifically named in the section. But they are similar in the one respect, to-wit, that of having money, claims, or other property in which another party has an interest. And in this respect it would seem that an executor having an estate in his hands, out of which, under an order of court, which must some day be made, there will be money to be paid to a legatee, may well be said to be "like" those specifically named in the section. Surely such legatee has an interest in the property in the executor's hands, and no greater inconvenience can come to the executor, by making him the subject of garnishment on account of a debt due from such legatee, than must come to a sheriff, clerk of courts, special master commissioner, or other ministerial officer, in making him the subject of this process.

In the case of *Shewell v. Keen*, 2 Whart. 332, the supreme court of Pennsylvania, in discussing the question of whether a foreign attachment would lie for a legacy, used this language:

"An executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations."

And again in the same opinion this language is used:

"The case of an executor or administrator is analagous to that of a sheriff or prothonotary. He has funds in his hands as an officer or trustee authorized by law."

Attention has already been called to the decisions of the supreme court of Massachusetts to the effect that moneys

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in the hands of one deriving his authority from the law, and obliged to execute it according to the rules of law, cannot be charged as garnishee. After those decisions were made, however, a statute of that state was enacted—Revised Statutes, chap. 109, sec. 301, providing that any debt or legacy due from an executor or administrator, and any other goods, effects, or credits in the hands of an administrator or executor, may be attached by the trustee process. Under this statute it has been held in *Cady v. Comey*, 10 Metcalf 459, that a legacy could be attached, although there was not money in the hands of the executor to pay it, but that process should be stayed until real estate could be sold to raise the money, and the creditor in the attachment proceeding required to give an undertaking to refund, if necessary to pay other demands. In *Hoar v. Marshall*, 10 Metcalf 251, under the same statute, it is held, that an executor is chargeable, in a trustee process, for the amount of the legacy in his hands at the time of service. In the case of *Holbrook v. Waters*, 19 Pickering 354, it is held that a legacy can be attached before an order of distribution is made.

In *Wheeler v. Bowen*, 20 Pickering 563, this language is used: "The interest of an heir in an estate in the hands of an administrator is liable to be attached before the order of distribution is made, even when it is uncertain whether there will be anything to distribute; the case being continued to give opportunity for the settlement of the estate."

It will be noticed that the statute under which this decision was made does not provide that the portion of a distributee of the estate of the decedent may be the subject of garnishment, but that any debt or legacy due from an administrator, and any other goods, effects or credits in the hands of an administrator or executor, may be attached by the trustee process. The provision then is, that a debt due from an administrator may be attached, and that a legacy

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may be attached, and that any other effects or credits in the hands of an administrator may be attached. But the supreme court of Massachusetts say, that the distributive portion to which one may be entitled out of an estate may also be attached, and that before any order of distribution.

On page 564 this language is used in the opinion:

“The object of the statute giving this remedy against executors and administrators is very obvious, it being designed to carry out more perfectly the means of enforcing the principle, that all the property of the debtor shall be made subject to legal process for the payment of his debts. Previous to the enactment of this statute, executors and administrators could not be summoned as trustees; and the effects and credits of others in their hands were beyond the reach of the attaching creditor. To remedy this evil the statute was passed, and it will be our duty to give such effect to it, so far as the provisions of it will admit, as will secure this object.”

Assuming that our supreme court, without section 5531, would hold, as seems to have been the holding in most of the states, that a distributive portion in the hands of an administrator, or a legacy in the hands of an executor could not be attached, for the reasons hereinbefore stated, the reasons being the same as those given why such funds in the hands of a sheriff, clerk of court, coroner, constable, and the like, can not be so taken, does it follow that in giving a construction to sec. 5531 it would be held that it does not include executors and administrators, who are ministerial officers, and who, as the supreme court of Pennsylvania has said, in the case to which attention has already been called, have duties which are analagous to those of the prothonotary or the sheriff? Exactly the same reasons exist for including executors and administrators as exist for the including of the other officers named in the statute, and the same reasons which would make it troublesome and involve difficulties if it be held

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that executors and administrators may be held to answer as garnishees, exist as to the requiring sheriffs, coroners, clerks, and the like, to be held to answer as garnishees. The case of *Woodworth v. The State*, 26 Ohio St., 196, is instructive on the proper meaning to be given to the words "or other officers". In addition to authorities already cited, attention is called to the following: *Stratton v. Ham*, 8 Indiana, 84; *Palmer v. Noyes*, 45 N. H., 174; *Fenton v. Fisher*, 106 Pa. St., 418; *Simonds v. Harris*, 92 Indiana 505; *The City of Newark v. L. S. Funk et al.*, 15 Ohio St., 462.

Entertaining these views, we hold that there was error on the part of the court of common pleas in sustaining the motion to dismiss the attachment and release the garnishees, and for these reasons the judgment of the court of common pleas is reversed, and the cause remanded to that court for such further proceedings as are provided by law.

The same reasoning applies to No. 16, the case of *Marian Sampsell v. Homer A. Sampsell*, and for these reasons the judgment in that case is reversed and the cause remanded.

*Carey, Boyle & Mullins*, for Plaintiff in Error.

*W. G. Wells*, for Defendant in Error.

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(Third Circuit—Hancock Co., O., Circuit Court—Dec. Term, 1897.)

Before Day, Price and Norris, JJ.

THE WINDISCH & MUEHLHAUSER BREWING CO. et al. v.  
CLARA OPP.

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*Contest of will—Issue—*

- (1). The only issue that can be submitted to the jury in an action involving the setting aside of a will is, whether the writing produced by the proponents is the last will of the testator or not.

*Same—*

- (2). In such an action, if the petition sufficiently directs the attention of the court to the fact, that the validity of the will

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is challenged and that the proper parties are before it, it is for the court to see that the issue is made up, and submit that phase of the litigation to the jury, no matter what other causes of action may be asserted in the petition, or what other parties are drawn into the controversy by the pleadings.

*Evidence of mental incapacity—*

- (3). Manifestations of mental disturbance by the testator, though remote as to time, are not remote to the issue if, when connected with other evidence of mental weakness of recent date, they tend to reflect light upon testator's condition at the time the will is made.

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NORRIS, J

The defendants in error were the plaintiffs, and the plaintiffs in error were the defendants in the court of common pleas.

The action was brought in the court below to set aside the will of one Ida E. Opp. The plaintiff, Clara Opp, and the defendants Dora Alspach, Wilber Opp, Ida Opp, Blanch Opp, and Hazel Opp are the only children and heirs at law of the testatrix, Ida E. Opp. Willoughby F. Opp was the husband and is the widower of Ida E. Opp, and is the sole legatee and devisee under her will.

The validity of the will is attacked in the amended petition of plaintiff, upon the ground that at the time the will was made, Ida E. Opp, from protracted illness, was mentally incapacitated, and was not of sound mind, and that she was coerced into signing the paper which purports to be her last will, by the influence of her said husband, Willoughby F. Opp; and by false representations made by him that said paper was not a will.

The other parties made defendants to the action, are parties who claim title to parts of the property to which Opp succeeded by this will, and who claim title under or through him.

To the amended petition a demurrer was filed by the Brewing Co. First: Upon the grounds that said pleading does not state facts sufficient to constitute a cause of action

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Second: That several causes of action are improperly joined. The demurrer was overruled by the court below.

Answers are filed by the Brewing Co., Charlotte Fillwock and August Rusinger and others, setting up their respective titles, denying the salient allegations of the petition, asking that the will be sustained, and for such proceedings as may protect their interests and prevent loss. The other defendants do not answer.

The issue made upon the journal of the common pleas was, whether the writing mentioned in the petition is, or is not, the will of the testatrix, Ida E. Opp. This issue being submitted to a jury, resulted in a verdict not sustaining the will. The motions of the answering defendants for new trial were overruled, and the court entered judgment on the verdict. To reverse this proceeding the defendants except the Opps prosecute error.

The reasons assigned for reversal are, that the verdict is contrary to law, and is not sustained by sufficient evidence; error in admitting evidence over defendants' objection, and in rejecting evidence offered by the defendants, and error in overruling the demurrer to the amended petition.

As to the overruling of the demurrer.

The issue to be submitted, and the only issue that can be submitted to the jury in an action to set aside a will, is:

"Whether the writing produced by the proponents is the last will of the testatrix or not".

The issue to be tried having been prescribed by statute can not be—says 52 Ohio St. 520—varied and restricted by averments in the pleadings. So it would appear that if the petition sufficiently directs the attention of the court to the fact that the validity of the will is challenged and that the proper parties are before it, the court submits that phase of the litigation to a jury, no matter what other causes of action may be asserted in the petition, or what other parties are drawn into the controversy by the pleadings. We think the demurrer was properly overruled.

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The validity of this will is directly assaulted by the amended petition, and there was no other way but to submit the issue, as was done by the court.

As to the error assigned in the court admitting and rejecting evidence, it is held, 52 Ohio St., 519, "that the specific ground of contest to which the evidence relates need not—to render the evidence admissible—be alleged in the petition, but that any evidence—competent—tending to prove that, for any reason, this instrument in contest is not the valid will of the testatrix, is admissible.

There is no testimony in the record tending to show that Willoughby F. Opp falsely represented to the testatrix that the paper she was signing was not a will; so that ground of contest is not considered.

The reasons urged for the invalidity of this will are, that the testatrix was, at the time the paper was signed, of unsound mind to a degree that precluded testamentary capacity, and that she was coerced by the undue influence of her husband. And the evidence appears to have been directed to these grounds.

The first objection to evidence urged as error is found on page 5 of the bill of exceptions. About a month before she was taken with her last sickness, one of her younger children (Wilber), was away from the house during the prevalence of a heavy storm. This occurrence appears to have affected her strangely. The relation of it by the witness was objected to by defendants as remote, and the court admitted the testimony over the objection. As related by the witness, it appears the boy was away from the house during the storm, and that testatrix became very anxious and much excited, but when the boy returned safe she quieted down until evening, when her condition became so alarming to her family that a Doctor was sent for; her mind was filled with vagaries and alarm. She imagined that her daughter Dora, the witness, Mrs. Alspach, was being killed at the



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school house. When Dora presented herself, the testatrix failed to recognize her, but still insisted that her hallucination was a reality; she then imagined that her son-in-law was being killed, and the next day tried to jump out of the window. The witness says from that time on she appeared on occasions to be flighty. She seemed to be very jealous of her husband, and would insist that he was away talking to some one else when he was standing before her. She imagined that her people from a distance were in the next room waiting for her, and wanted to go to them; at one time she claimed her step-son was going to kill her. This was a month before she took her last sickness, but from that time on she complained, says the witness. She would wrap herself in a heavy blanket, even though the weather was exceedingly warm; she appeared gloomy and in low spirits. About two weeks before her last sickness she made known her intentions of poisoning herself, and her preparations to so do were discovered by her family. And shortly after this she fancied her husband had been hurt in a fight and insisted on seeing blood on his face when there was no blood there. In ten days or two weeks, the disease which ended in her death manifested itself; from this time she lived about eight days and she died on the 12th of October in the morning. We think that her condition at the time and immediately following the storm was so recently before her death and so followed by other manifestations of mental disturbance, as to reflect some light upon the condition of her mind at the time the will was signed, and facts that thus tend to enlighten the jury are admissible whether the dates of such manifestations are a long time or a short time before the making of the will. Such facts, though they may be remote as to time, are not remote to the issue.

On page 100 of the bill of exceptions is the cross-examination of Dr. Van Horn, who was called by the plaintiff as an expert. A series of questions had been put to him by

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counsel for defendants, as to the probability of erysipelas—of which disease the testatrix died—inducing delirium. After answering the question, he was asked, “whether or not a physician in charge of the case would know more about the condition of the patient, than a physician to whom a hypothetical question was put.” The court sustained the plaintiff’s objection to this question, and we think properly. The inquiry would involve and provoke investigation as to the knowledge and experience and skill and judgment of the physician in charge, and the balance of the medical profession, and when answered would be but the opinion of a man who didn’t know. And at any rate, his opinion (on the subject) was reached farther on.

The last ruling objected to is found on page 109 of the record. To Dr. Ewing, who was offered by plaintiffs as an expert, the condition of the testatrix for the week preceding her death had been described, and he was asked that, “if when she was well she was accustomed to drink beer, whether or not that fact would increase or diminish the probability of her being delirious in her last sickness.” He answered, “that the fact that she drank beer at all would increase the probability.” This answer was objected to, and the objection was overruled. We see no error in this. There is testimony tending to show that while in health preceding her last sickness she did drink beer, not to excess however, but the answer carries with it its own pertinency, and was properly allowed.

There is no objection to the charge, which is a clear exposition of the law of the case.

This woman died on the 12th of October, Saturday morning, at about 3 o’clock. Her disease was pronounced by the physicians to be erysipelas. It manifested itself on her face and head; it became noticeable on Friday the 4th, and grew more virulent until it killed her. The will was signed on the Thursday before her death. At this time the

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testimony shows her head was swollen to nearly twice its natural size, and her eyes were nearly closed, she had the fever that naturally attended such a condition. On Monday she did not know her son Wilber, the boy whose real or fancied danger from the storm had so distracted her a month before. On Wednesday, she fancied that Mrs. McCall, a friend who had been long dead, was in the room with her. On Thursday forenoon, the day the will was signed, she imagined that her people from Pennsylvania who were dead, sat in the next room waiting for her. A neighbor woman whom she well knew called to see her in the afternoon, and she did not recognize her. From the time the will was signed to her death she was generally quiet except when aroused to take medicine or nourishment, and then she fancied they were giving her poison.

For a time before the will was signed she did not take much notice of anything. She was an affectionate and attentive mother, yet she paid no attention to her children when they came to her. In the forenoon before the will was signed she did not know her neighbor, Mrs. Levan. She thought she was away from home, and was lost, and wanted to get home to her baby, yet when the baby was brought to her bed side, she didn't know it. Along between 3 and 4 o'clock of that day, she insisted on going home, tried to get out of bed and wanted to go home. She had made her will the same afternoon, and this appears to have been the true condition of this woman at and about the time the will was signed. She never got better, but grew worse from the day she was taken until she died. The Doctor, Dr. Gius, recognized the gravity of the situation early in the week, when he told Opp if he had any business to transact with her he had better be about it.

Opp is the sole legatee and devisee of this will, her children whom she appeared to love so well, the little son for whose safety she evinced such solicitude, the little baby

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from which in her delirium she fancied she was separated and to which she wanted to return, were not remembered in that will. It was a ready-made document when it reached her; her husband had it prepared; her husband held her up in bed when she signed it. She barely assented to the questions put to her by a nod of the head or by a yes or a no.

Dr. Gius swears that he never saw her when she was delirious, and that he thinks she was of sound mind when she signed the paper. Mr. Phelps, who saw her for only a few moments, says that from what he saw he thinks she was of sound mind.

The jury concluded that the woman when she signed that paper did not know what she was doing, and that she was not of deposing mind and memory, as defined to them in the excellent charge of the trial court. We cannot say the verdict was wrong, and finding no error in the record to the prejudice of plaintiff in error, affirm the judgment at costs of plaintiff in error, without penalty.

*James O. Troup*, for Plaintiff in Error.

*John Poe* and *Elisha Dunn*, for Defendant in Error.

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(Sixth Circuit—Lucas Co., O., Circuit Court—March Term, 1897.)

Before King, Haynes and Parker, JJ.

ANNA C. MOTT v. THE CITY OF TOLEDO.

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*Under the law of Ohio, a party may acquire title to real estate as against the municipality by adverse possession—*

The occupation by abutting owners, of a street, by taking possession of the whole, including it within the boundaries of their land, using and occupying it as a part of their premises, selling and conveying it to purchasers for a valuable consideration, establishes adverse possession.

While an encroachment upon a street by a permanent building would establish adverse possession, a mere incroachment up-

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on the street by the erection of a fence, or even a stonewall, would not do so. But the occupation of the entire street, to the exclusion of the public for all purposes for which the street was dedicated, constitutes adverse possession, and if continued for twenty-one years, will bar the rights of the public to the street.

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(Affirmed by supreme court without report, April 18, 1899.)

KING, J.

This case was submitted to the court with that of Thomas Rowland against the city of Toledo. I shall first notice the Mott case.

This action was commenced in the court of common pleas, October 29, 1894, for the purpose, as alleged by plaintiff, of quieting her title as the owner and in possession of a strip of land fifty feet wide by two hundred and sixty-six feet long, lying southeast of Nineteenth street, and asking for an injunction enjoining the city of Toledo from entering upon the premises described, and taking them and improving them for use as a street.

The petition averred that the city was about to do that, and by its council had passed a resolution having that as its purpose.

There is an answer denying the allegations of the petition, and the case was submitted to the court upon the evidence offered and an agreed statement of facts.

The property in question, with other land adjoining it, was owned by Henry W. Hicks and Richard Mott, and on February 20, 1866, they executed and acknowledged a plat that had been prepared for them of this tract of land, which they presented to the council of the city, and it was by the council duly accepted, and on March 21, 1866, was recorded in the records of plats in the office of the county recorder. The whole tract ran from Nettie street on the west to Sixteenth street on the east, which are now and were at the time of the plat opened and traveled streets, and was bound-

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ed on the north by Monroe and on the south by Washington streets, which were and are opened and traveled streets, Monroe street running through the city from the Maumee river in a westerly direction and is one of the most important streets of the city. They laid out on the plat certain streets crossing this tract from north to south, notably Seventeenth and Nineteenth streets, which were shortly opened and have been repeatedly improved by the city. They also laid out between Washington and Monroe a street called Bartlett street, which was opened from Nettie to Nineteenth street and improved by the city, and the lots abutting thereon sold off to various owners and built upon. Bartlett street from Nineteenth street east was not opened by these dedicators, nor their successors in title, nor has it been opened by the city or the public, or any attempt made in that direction until July 13, 1894, when the council adopted a resolution providing for the improvement of Bartlett street from Nineteenth to Sixteenth. I may as well say here that Washington and Monroe are thoroughfares running through the city, and that the opening of Bartlett street as now proposed by the council would not benefit in the way of shortening travel or otherwise any of the owners of the property abutting on that street further west. By the plat referred to, the lots laid out as fronting on Monroe extend back to Bartlett street, a distance of two hundred and twenty-one (221) feet, while the lots between Bartlett and Washington are made substantially one hundred feet in depth with an alley running parallel with Bartlett street between them, but no lots have ever been sold by the proprietors of this tract abutting on the south side of Bartlett street between Nineteenth and Sixteenth streets.

On October 25, 1866, the said owners by a warranty deed expressing a consideration of nine thousand dollars, conveyed a portion of these premises to James M. Hicks by this description: Commencing on the southerly corner of

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Monroe and Nineteenth streets and extending easterly along the southwest line of Monroe street, two hundred and sixty six feet; thence southwesterly at a right angle from said last named street three hundred and forty-six feet; thence northwesterly on a line parallel with Monroe street two hundred and sixty-six feet to Nineteenth street; thence northeasterly along Nineteenth street, three hundred and forty-six feet to the place of beginning on Monroe street, being in Mott's addition, and comprising lots 23, 24, 25, 26, 27, 28, 36, 37 and 38 of said addition.

The lots 36, 37 and 38 abutted upon Monroe and ran back to Bartlett street. Lots 38 and 37 were each one hundred feet wide, and lot 36, sixty-six feet, and these lots are 221 feet in depth. The other lots named abut on the south side of Bartlett street and run back to an alley, and are from forty to sixty-six feet in width. These boundaries, it will be observed, include the whole width of Bartlett street extending east 266 feet from Nineteenth street, and also include the lots abutting upon Bartlett street in the plat seventy-five feet from their northerly ends.

This deed, executed October 25, 1866, was recorded December 23, 1870. On July 1, 1873, James M. Hicks, the then owner of that rectangular piece of land, by his deed conveyed the same, by the same description, to Anna C. Mott, the plaintiff. This deed was recorded August 4, 1873, in the recorder's office, and since that date Anna C. Mott, plaintiff, has been the owner of all that property, and so remained at the time of the commencement of this action.

In 1873 she commenced the erection of a dwelling house on this property which fronts on Monroe street, and that year, and the year following, erected a dwelling house, and some time after erected a barn upon lots 36 and 37, the southerly line of which corresponds, very nearly at least,

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with the northerly line of Bartlett street; but the premises described in her deed were used by her ever since she began to live there, as they had been to some extent before, by the owners of this property, as a part of the entire piece of property there. In other words, the land lying south of the three lots fronting upon Monroe street was used as adjacent and contiguous to the barn and house. It was used for pasturage of cattle and horses kept by Miss Mott, as a yard or place wherein they could be turned out, and some of the land was used for garden purposes. There was a fence built by the plaintiff along the northerly part of Bartlett street from the barn to Nineteenth street, substantially on the northerly line, and that has remained there ever since. There was also another fence on the south line of Bartlett street at the time plaintiff acquired her title which ran back as far as this property, 266 feet. That fence was moved two or three years ago, but the property between that fence and the alley which I spoke of has always remained as a part of the premises belonging to the estate of Miss Mott. In other words, she holds her property as taken in the deed 346 feet in one direction and 266 in the other. Along Nineteenth street, between these premises and the street, there has been a fence all the time since before the execution of this plat, and it remains there now, with suitable gates for ingress and egress in and upon these premises. The facts further show that this part of these premises has been, during all the time that Miss Mott was the owner, and ever since the execution of this plat, in the possession of the owners of this property. Other facts might be cited, but they would not bear upon the question raised, and that is whether Miss Mott has acquired title to that part of Bartlett street passing through her premises by adverse possession against the city and the public. This has been very fully and ably argued by counsel on both sides, and a great many authorities have been cited, many of which we shall be unable to review



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The claim is made on the part of the plaintiff that under the law of Ohio a party may acquire title to real estate as against a municipality by adverse possession. This we do not understand to be disputed by the city, but the claim is made that the law is limited by the authorities and decisions in this state to an actual occupation by permanent improvements. In other words, that what has been said, if anything, by the courts of this state that would seem to bear a different construction, must be limited to an actual occupation of the property for twenty-one years, by improvements that are designed to be permanent in their nature. We are left to determine between these conflicting opinions as to what is the law in this state relating to this single question. There are many decisions which refer to it. Commencing back as far as 1838 in the 8th Ohio Reports, at page 299, is a case in which the court, by Judge Lane, on page 310, very briefly stated the law of this state to be as follows:

“No case is found in the books which exempts any other description of person, whether natural or artificial, from the operation of the laws; and none of the reasons for the exemption apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. When the property is their own, the statute has been always held as binding; when their land or franchises are of public character, the public which they represent are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them. The rights of the corporation, therefore, seem well enough protected without invading the letter of the statute.”

That was the first case in which the court was called upon to pass upon this question. They affirmed this doctrine in a case in the 1st Ohio St., 478-510, and again in the 5th Ohio St., 594-602-3.

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In the 5th Ohio St., Judge Ranney refers to the decisions in the 8th Ohio and 1st Ohio State Reports as establishing the doctrine in this state, and says in addition that they have his unqualified sanction and approval. The case in the 5th Ohio St. relates to a public highway.

In the 13th Ohio St. the court were again called upon to pass upon the question where it was raised, and this was an obstruction to only a portion or strip of the land along one side of it which did not interfere with the public use of the street. The court in that case, on page 48, says:

"It must be borne in mind that, in the case at bar, the road was not closed up, and the public thereby excluded from any use of the street. In such case, the entire exclusion of the public would doubtless be such an ouster or dis-seizin, as would require a suit to be brought within the statutory period, upon the principles settled in *Lessee of the City of Cincinnati v. The First Presbyterian Church*, 8 Ohio Rep., 298. Nor is it like the case of *The City of Cincinnati v. Evans*, 5 Ohio St. Rep., 594, where the purpose of the possession and intended permanency were indicated by the erection, within the bounds of the street, of the front of a large and costly ware-house. The erection of such a building, in such a place, was ample notice to the city authorities to his private and individual benefit of a portion of the public easement, and called for immediate and effective measures upon their part to prevent it."

I notice particularly that language where the court say, in the 13th Ohio St., that in the case before them there was not an entire exclusion of the public. If there had been, it would doubtless be such an ouster as would require the suit to be brought within the statutory period. And saying further it was not like the case in the 5th Ohio St., where it was an encroachment, but of the character of a notice to the public of an intention to occupy. Now there are several more of these cases: 28 Ohio St., 488, is also the occupation of a strip of land on one side of a public highway, and, also 38 Ohio St., 87. This was the occupation by a private

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individual of a lot of land that it was claimed had been conveyed or patented to Oxford township for school purposes, and the court there considered the question whether an individual might acquire title by adverse possession, and say, on page 96:

“The remaining question, then, is whether the statute of limitations applies, assuming that the plaintiffs, as trustees of Oxford township, acquired title to the premises, by donation from the general government in 1841 for the benefit of schools. That the maxim ‘*nullum tempus occurrit regi*’ is applicable to the general and state government is not denied; but it was held in *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, upon the fullest consideration, that the maxim did not apply where a city prosecuted an action of ejectment to recover possession of lots dedicated to public use, the defendants in the action having been in the adverse possession of the lots for more than twenty-one years. I am aware that cases may be found in opposition to that decision. Several of them are collected in a note to the case as reported in 32 Amer. Dec., 718, 721. But that decision has been repeatedly approved in this court, and, as applied to a case like the one under consideration, it is amply supported here and elsewhere.” Citing 1 Ohio St., 478; 16 Ohio St., 11; 50 Mo., 195; 2 Dillon on Mun. Cor., sections 668, 674. “As to the application of the rule to adverse possession of public ways, see *Cincinnati v. Evans*, 5 Ohio St., 594; *Fox v. Hart*, 11 Ohio, 414; *Lane v. Kennedy*, 13 Ohio St., 42; *McClelland v. Miller*, 28 Ohio St., 488; *Railroad v. Commissioners*, 31 Ohio St., 338.”

There is a case in the 52 Ohio St., page 460, which follows out the established line of these decisions:

“The right of an adjacent land holder to inclose by a fence, however constructed, a portion of a public highway, can not be acquired by adverse possession, however long continued.”

And the court say, on page 467:

“More recent cases place the right of the public as against encroachments on its highways, however long continued, on the ground that they are public nuisances

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in favor of which the statute of limitations does not run."

Recently there was a case before the circuit court in the second circuit, 6 C. C., 142, and Judge Shearer in announcing the decision of the court has this to say, having discussed one of the claims made which might have been decisive of the case. He adds, at page 140:

"But if the views above stated are wrong, it is clear that the plaintiffe must fail upon another ground, namely, that Taylor's title is established by adverse possession. After Ramsey's dedication, which was in 1856, he remained in said adverse possession until the year 1860; and although the city had accepted the grant, by ordinance, it did not, nor did it ever take possession of said streets, etc. In 1860 Ramsey conveyed his title to all said lots, and his grantees and said Taylors have been in the possession thereof ever since, and until within two years kept the same enclosed, used them for pasturage, and treated the same as their own, without objection on the part of the city or of said plaintiffs. No steps were ever taken by plaintiffs, or those under whom they claim, to terminate such use and occupation, or to enforce the trust created by the dedication, or to prevent the ripening of Taylors' title. They stood by and acquiesced in the open, notorious, continuous, peaceable and exclusive possession of the occupants. And as the statute began to run as early as 1860, and continued to run without interruption until this action was brought in 1890, the Taylors have acquired a valid title to said property."

The case is referred to by the supreme court in deciding two other cases, which are affirmed on its authority, 31 W. L. Bull., 156.

We assume that the decision by the circuit court is approved on both points decided, and that the supreme court in affirming the other judgments affirmed them upon the second ground as well as upon the first. If that be so, the case in the second circuit court, as far as possession is concerned, is like the one before us, as the lots were fenced in

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and used for pasture. There is some evidence here to show that some of the time plaintiff used a portion of this land for garden purposes, and it was a use incident to the occupation of the balance of the property by the person who owned it. The case in the second circuit court is no stronger, so far as possession is concerned, than the one before us. It has in it the same element as that here, having been dedicated for public purposes, as evidenced by a plat which was shortly after accepted and recorded and the title thereto vested in the city for street purposes merely, and in effect that dedication was repudiated by making a deed therefor and conveying it to another. So far as this defendant or this property is concerned, such conveyance by the dedicators is an act which should be notice to anyone who thereafter acquired or claimed rights in this property, to the effect that they did not propose to recognize the dedication any further.

The grantors described this land by metes and bounds, which govern; giving the length of each line and the location, "being in Mott's addition, and comprising lots numbered 23, 24, 25, 26, 27, 28, 36, 37 and 38." The word "comprising" is used to mean "embracing" or "including;" including these lots and the street as well. The grantee purchased them and paid for them and entered into possession under the deed which was to him color of title, and since that time has occupied those premises for all the purposes for which the occupier has any occasion to use them. Now, if there be any adverse possession against a municipal corporation, we do not see why, in a case like this, it is not made out.

The occupation by the owners of the street by taking possession of the whole, including it within the boundaries of their field and their land, using and occupying it as a part of their premises, selling and conveying it to purchas-

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ers for a valuable consideration, it seems to us a pertinent way of establishing an adverse possession.

It is not essential that there should have been a permanent building upon this street in order to establish adverse possession. The supreme court has not yet said so, and we leave that for them to decide. They have held that an encroachment upon a public street by a permanent erection would establish adverse possession. They have held in one case that a worm fence, and in another, a stone wall encroaching upon the street is not such an occupation as constitutes adverse possession; but where they have given any expression upon the question, they have held that the occupation of the entire street, and the exclusion of the public for all purposes for which it was dedicated, is such an occupation as will bar the rights of the public thereto, if continued for a period of twenty-one years, and we think we are bound to follow these decisions and to hold that the title to this property has been acquired by adverse possession. We hold that the plaintiff has acquired title to this property by adverse possession, which has continued the statutory length of time, and that thereby the right of the public to take possession thereof for the purposes of a street is barred.

In the Rowland case the facts are substantially the same. The Rowland property adjoins the Mott property on the east, and is bounded by Monroe and Seventeenth streets. The dedicators conveyed their title in the two lots, which comprise the Rowland property, about the time of making the plat, and in their deed simply conveyed the lots by the numbers upon the plat, and did not undertake, as in the Mott case, to convey any part of Bartlett street; but the owners of the two lots who have succeeded in title to those who made the plat have enclosed within their premises one-half of Bartlett street from the Mott property east to Seventeenth street. Next south the adjoining owners have included the other half of Bartlett street in their property, but these

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owners are not involved in this action, and for more than twenty-one years before the commencement of this action and before the adoption of the resolution by the city council, the owners of the Rowland property have kept it enclosed and have improved it as residence property by filling it up and raising the level somewhat above that of the streets and of surrounding property, and have effectually excluded the public from any use of that part described on the plat as Bartlett street. And we find that Rowland has an adverse possession of the strip of land twenty-five feet in width described in his petition within the definition in such cases sufficient to give him title to that strip.

We do not intend to decide now that the owner of land who dedicates it for street purposes, may himself set up a title against the public claiming to hold by adverse possession, unless he shall hold by such possession of the property after the dedication, as to have made it notice to the public and to the city that he intended to hold that property against the city and to ignore or to set aside his deed of dedication. In other words, we do not intend to hold in this case that the dedicators of this property for Bartlett street, without changing the nature of the possession, might occupy it substantially as it was occupied before, and then set up title to that street by adverse possession. Whether such a possession would be adverse in Ohio, we do not undertake to decide; but we do say that a grantee who has purchased and is not bound by the deed of dedication, may set up title by adverse possession if he has occupied, enclosed and used the land for the statutory length of time, and has excluded the public therefrom.

Decided March 25, 1897.

*J. Kent Hamilton*, Attorney for Anna C. Mott.

*Emery Potter*, Attorney for Thomas Rowland.

*C. W. Watts*, City Solicitor, *J. H. Tyler* and *H. S. Merrill*, Attorneys for Defendant.

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Gitsky v. Newton.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before Shearer, C. J.; and Haynes and Parker, JJ.

(Judge Shearer, of second circuit, sitting in place of Judge King.)

GITSKY v. NEWTON.

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A "judge and justice of the peace", elected, commissioned and qualified under section 621-1 et seq., Revised Statutes, (93 O. L., 322) is at least a *de facto* officer, *colore officii*, and against all but the state an officer *de jure*; and the title of his office cannot be questioned otherwise than by proceedings in *quo warranto*.

(Affirmed by the Supreme Court without report. See 41 Bulletin, 268.)

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Error to the Court of Common Pleas of Lucas County.

SHEARER, C. J.

The original action was in forcible detainer before a "judge and justice of the peace" of the city of Toledo—locally called a "city judge". Judgment was rendered in favor of the defendant in error, and affirmed in the court of common pleas. To reverse these judgments is the object of the present proceeding.

The grounds assigned for error, among others, are the overruling of a motion to quash the service of summons and a motion to dismiss the action for want of jurisdiction by reason of the alleged unconstitutionality of the act authorizing the election, in cities of the third grade, first class, of "judges and justices of the peace." Revised Statutes, sec. 621-1 et seq., (93 O. L. 322). In other words, that the statute being invalid, the judge and justice of the peace (or city judge) had no legal existence nor power to hear and determine the cause.

This contention is disposed of adversely to plaintiff in error in *The State v. Gardiner*, 54 Ohio St., 24, the syllabus of which case reads as follows:

"In a prosecution for offering a bribe to an officer, who is acting as such under a statute providing for the government of a municipal corporation, the defendant cannot question the constitutionality of such statute."



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Gitsky v. Newton.

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Gardiner was indicted for attempting to bribe one Hugill, who held the office of City Commissioner of Akron. A demurrer was interposed to the indictment on the ground that the statute under which Hugill was acting was unconstitutional, and that, assuming the invalidity of the statute, the office had no existence in law or in fact, and there could be no officer *de facto* or *de jure*.

The court of common pleas sustained the demurrer, and this action was made a ground of exceptions in the supreme court, where the exceptions were sustained.

In the course of the concurring opinion Spear, J., says, quoting from *Campbell v. The Commonwealth*, 96 Pa. St., 344.

"The prisoner had been convicted in Fayette county of arson in burning a dwelling house and other buildings.

"Two associate judges, not learned in the law, but who had been elected by the people of the county and commissioned, sat with the president judge and participated in the trial and sentence. The validity of their title to the office, and hence of the composition of the court, was questioned on the ground that, under the constitution of 1874 and subsequent legislation, the people had no power to elect associate judges in Fayette county. It was held that they were judges *de facto*, and as against all parties but the commonwealth they were judges *de jure*, and, having at least a colorable title to their offices, their title thereto could not be questioned in any other form than by quo warranto at the suit of commonwealth"—

So here, the city judge and justice of the peace had at least a colorable title to his office, and was an officer *de facto* was in possession of his office, performing its duties, and until he is in some direct way adjudged to be without authority, his official acts are to be regarded as valid. They can not be collaterally attacked.

The admission of certain testimony is the basis of one of the assignments of error. It tended to question the title of the landlord, defendant in error. This could not

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be allowed unless it were shown that the defendant in error had parted with his title, or the like, after suit was brought. It was not claimed that anything of the kind had taken place.

It is also asserted that the trial court erred in excusing one of the jurors summoned in the cause, without the consent and against the objection of plaintiff in error; but no prejudice appears to have resulted from such action.

Finding no error to the prejudice of the plaintiff in error, the judgment will be affirmed.

*Moses G. Bloch*, for Plaintiff in Error.

*Kinney & Newton*, for Defendant in Error.

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(Third Circuit—Logan Co., O., Circuit Court—Oct. Term, 1898.)

Before Day, Price and Norris, JJ.

JOHN BLANEY v. THE STATE OF OHIO.

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*Irregularities, not of essence, in selecting a jury not available for challenging array—*

- (1). Mere irregularities and defects, not of essence, in the preliminary proceedings of selecting, drawing and summoning a jury, either grand or petit, affords proper grounds of challenge to the whole array or to individual members, but are not available and supply no sufficient basis for a motion to quash an indictment, or for a plea in abatement; nor will an indictment be held invalid for any defect or imperfection which does not tend to the prejudice of a substantial right of the defendant.

*Burglary and larceny—Possession as evidence of guilt—*

- (2). On the trial of defendant on a charge of burglary and larceny, at defendant's request, the court instructed the jury in substance, that the fact of possession by defendant of the stolen property, soon after the burglary and larceny was committed, is not of itself sufficient to warrant a conviction of defendant, but that to warrant such conviction there must be some direct evidence, implicating defendant in the crime, in addition to the fact of possession. Held: 1. The instruction was inaccurate in the use of the words "direct evidence"; "competent evidence" "would have been correct". 2. While the instruction was inaccurate it was not prejudicial to the substantial rights of the defendant.
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Blaney v. The State of Ohio.

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Error to the Court of Common Pleas of Logan county.

DAY, J.

At the February Term, 1898, of the court of common pleas, the plaintiff in error, John Blaney, was convicted and sentenced, on a charge of burglar and larceny of a lot of hides and furs, and error is prosecuted in this court to reverse that judgment and for a retrial of the case, because of errors said to be apparent on the face of the record.

Exception was taken to the indictment, first by motion to quash, and then by plea in abatement, neither of which was sustained. The court refused to charge as requested on the subject of property recently stolen, found in the possession of the accused, but charged the jury on that subject in phraseology differing from that of the request. Exception was noted to the refusal to charge as requested, and to the charge as given. These several exceptions form the principal grounds of plaintiff's claim of error.

The motion to quash and the plea in abatement are based, substantially, on the same facts, consisting of alleged defects and irregularities in the selecting, drawing, summoning and impanneling of the grand jury that found and presented the indictment against the accused, and the two propositions are considered and disposed of as one.

The defects, pointed out in the preliminary steps preceding the indictment on the motion to quash and the plea in abatement, are: That the prescribed number of grand jurors, one hundred and twenty-five being the legal number for Logan county, was not written by the clerk on separate slips of paper, as the law requires, and placed in the wheel, and that no names were drawn from the wheel. Two of the grand jurors were not summoned ten days before the jury was organized. The record does not show that the indictment was presented to the court by the foreman of the grand jury. That there was no such person in existence as F. M. Draper, yet that such name constituted one of the

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number that was placed in the wheel, and also one that was drawn out of the wheel for this particular grand jury. That John Vanalstine was misnamed in the summons as John Valentine, and the misnomer was corrected by the officer. The panel was filled from the bystanders, by direction of the court, and F. N. Draper was put upon the panel and constituted foreman of the jury. These defects, with possibly others named and pointed out, formed the basis of the motion to quash and the plea in abatement. They are all in a large sense technical, and are mere irregularities, such as are usually incident to all merely human proceedings. Misnomer, if it amounts to that, in the names of Draper and Vanalstine, seems to be the most serious, and the underlying cause of all the censure. The criticism is not made, either directly or inferentially, that the persons constituting the grand jury were not proper persons in every way, and competent to act in that behalf, but only that there were technical defects and irregularities in the proceedings in which they were selected, summoned and impaneled. None of these things are of essence, and it is believed, unless they are they cannot properly be made the basis of a motion to quash the indictment, or of a plea in abatement, but must, by express statutory provision, be availed of, if at all, by challenge before the jury is impaneled and sworn. Section 5175 R. S. is as follows:

“A challenge to the array may be made and the whole array set aside by the court, when the jury, grand or petit, was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or

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misanomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

This section is a direct and express inhibition of law against finding any indictment invalid by reason of misnomer or mere defective or irregular proceedings in the selection, summoning and impaneling of jurors; and as if to emphasize the legislative disregard, if not contempt, of mere technical matters in the administration of criminal law, section 7215, Revised Statutes, supplementing sec. 5175, was enacted, providing:

"No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, by omissions not of the essence of the offense. \* \* \* Nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

These two sections, both of which are held to be valid legislation, cover the case at bar, and effectually put out of consideration as prejudicial errors, the defects and irregularities pointed out and relied on in the motion to quash and the plea in abatement. None of them appear to have been to the prejudice of any substantial right of the accused upon the merits.

On the subject of possession by the accused of recently stolen goods, soon after the burglary and larceny was committed, the defendant requested the court to charge as follows:

"In the absence of direct evidence that the defendant, John Blaney, committed the burglary and larceny complained of, something more than possession and control by him of the property alleged to have been stolen is necessary to warrant a conviction of the said John Blaney in this case"

The court declined to charge in terms as requested, but did charge the jury on that proposition as follows:

"If you find beyond a reasonable doubt that the burglary and larceny was committed and by means thereof these

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skins, or a portion of them, and other property of Miller was stolen therefrom, and shortly after such burglary and larceny a part of the property so taken was found in the possession of defendant who either failed to give an explanation as to how he obtained possession thereof, or gave a false explanation, then in such case, such possession of said property by defendant, may afford the presumption of the fact that defendant is not only guilty of larceny, but of burglary as well, and warrant the jury in so finding; but in case there is no direct evidence that the burglary and larceny was committed, then the mere possession by defendant of the property or a portion thereof would not of its self warrant the jury in finding the defendant guilty."

Exception was taken and noted to the refusal of the court to instruct the jury as requested, and also to the instruction as given. It would be difficult to detect or define any difference, other than in phraseology and form, between the statement of the rule of law obtaining in such case, as given by the court and as requested to be given. They are substantially the same, and are in the main part a restatement, in substance, of the rule as stated by the Supreme Court, in the 19 Ohio St. Our notion of them is that both are largely correct, but incorrect in one respect. The statement that mere possession of stolen property soon after the crime is committed, &c. in and of itself, is not sufficient to base a conviction upon, is correct; but the further statement that direct evidence implicating defendant in the commission of the crime is necessary, also, to be present, we regard as inaccurate and having a tendency to mislead. Other evidence than mere possession there must be, but it is not necessary that it be direct evidence; it may, as well, be of the class known in the books as circumstantial evidence; and the circumstances, if competent and of sufficient gravity and weight, in connection with such possession, would unquestionably warrant and sustain a verdict of guilty. Competent evidence, therefore, and not direct would better express the rule obtaining in such case. But this error, if it is one,

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was procured by the accused, is directly in his favor, and he cannot be heard to complain of it. He certainly was not prejudiced in any degree.

Upon a careful consideration of the entire case we have not been able to discover any substantial or prejudicial irregularity, and, the judgment and sentence of the lower court is affirmed, with costs. The cause is remanded to the common pleas court for execution of sentence.

*Kernan & Cassidy*, for Plaintiff.

*S. H. West*, Prosecuting Attorney, for the State.

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(Sixth Circuit—Huron Co., O., Circuit Court—Mar. Term, 1899.)

Before King, Haynes and Parker, JJ.

FRANCES A. FISHER v. THE LAKE SHORE AND MICHIGAN  
SOUTHERN RAILROAD COMPANY.

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*Goods left in custody of common carrier to be crated before shipment—Liability—*

- (1). Where a carter conveys goods designed for shipment, to the freight depot of a railroad company and deposits them on the platform of such depot, where such goods are customarily delivered to and received by such company for shipment, and notifies the proper shipping agent of such company of the presence of such goods on the platform, and that they are to be shipped to a certain station on such railroad after one of the articles has been properly crated, and that a person will come and crate such article during the day, and the agent of the company expresses his assent to what is said and proposed. Held, this amounts to the delivery of such goods to the railroad company and its acceptance of the custody thereof as warehouseman.

*Same—Evidence of negligence—*

- (2). The plaintiff upon the trial having introduced evidence tending to establish the facts above recited, and also tending to show that later on the same day such goods were removed by some person and means and to some place unknown to her, and that upon demand said company failed to restore said goods to

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her, the court, on motion of the defendant, ruled that the plaintiff had failed to make out a case, and directed the jury to return a verdict for the defendant. Held, error. While it devolved upon the plaintiff to show that the defendant had been guilty of negligence in that it had failed to exercise due care in the premises whereby the goods had been lost, the facts above recited furnished some evidence of such negligence, and the case should have been submitted to the jury.

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Error to the Court of Common Pleas of Huron County.

PARKER, J.

Frances A. Fisher brought her action against the Lake Shore and Michigan Southern Railroad Company before a justice of the peace to recover an amount somewhat less than \$100 on account of the loss of certain goods which she had boxed up and designed to ship by the road of this company to Cleveland, Ohio, and which were lost. The case was tried before the justice, and the judgment of that court was appealed from. The case came on to be tried in the court of common pleas, and there, after the plaintiff had rested her case, the court, on motion of defendant, directed the jury to return a verdict for the defendant, which was done. To this ruling and direction of the court the plaintiff excepted, and, on account of it, she prosecutes error here.

It appears that a day or two before the first day of May, 1896, the plaintiff had shipped certain household goods by the Lake Shore and Michigan Southern Railroad to Cleveland; that on or about the first day of May, 1896, she had some additional goods prepared for shipment to the same place, some of which were packed in a large store box, and some in a small box, and there was also a sewing machine and two rocking chairs. She employed a city expressman or carter—a Mr. Roscoe,—to take these goods to the freight office of the company to be shipped, and she directed him to not have them shipped until the sewing machine had been crated. It appears it was not properly crated so that it would be shipped by the railroad company.



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Roscoe testifies that he conveyed these goods to the freight depot of the company in this city, and that he there unloaded them upon the platform. He testifies in part as follows:

“The boxes had cards nailed on them with the name of Frances A. Fisher written on them. These cards were on the upper side as I placed them on the platform.”

He also testifies that cards were tied upon the other articles—the chairs and sewing machine. He says:

“The place where I put these goods was the usual place for placing all such goods for shipment. I had been placing goods there almost daily for seven or eight years during the time I had been in the business at Norwalk. After placing the goods, I went into the depot and then into the freight office of the company and saw Mr. Warner, the clerk in that office, whose duty it was to attend to the shipment, and I said to him, ‘I have just put on the platform the remainder of the goods of Miss Fisher that should have gone to Cleveland with her shipment of yesterday.’ Mr. Warner said, ‘all right’. I then told him that she, the plaintiff, did not want the goods shipped till the sewing machine should be crated; that Mr. Schaffer would be there to do it for her during the day.”

The goods having been taken to the freight depot of the company by one whose duty with respect thereto ended upon their being deposited there and put in charge of the railroad company, the carter having placed the goods upon the platform at the place where goods brought for shipment were customarily delivered to and received by the company, the agent of the company having been advised of the placing of the goods there for shipment, such shipment, as he was advised, to be made as soon as certain preparation of one of the articles might be made, and the agent having, as we view the evidence, expressed his assent to such deposit of the goods and delay of shipment, this, in the opinion of a majority of the court, amounted to a delivery of these goods into the possession and custody of the railroad company and

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the receiving of the goods by the railroad company as custodian thereof; not, however, in the capacity of common carrier, but in the capacity of warehouseman. The company having been advised that something remained to be done to the goods and with the goods by the shipper in order to prepare them for shipment, it would not, under such circumstances, be chargeable as common carrier.

It further appears that at about 5 P. M. of the same day Mr. Schaffer appeared at the depot to crate the machine, and that at the time he came there the box of goods on account of which this suit is prosecuted was not there; it had disappeared—where or how does not appear from the record.

On the day following the plaintiff, who had the receipt for such part of the goods as had been actually shipped, appeared at the freight office of the defendant company in Cleveland and demanded her goods, including this box of goods which was not receipted for, Schaffer, who obtained the receipt for the goods from the Norwalk agent, having had no knowledge of the large box.

It appears that the company made some effort to find the goods but was unable to do so, and that it has not delivered the goods to plaintiff.

The company having received these goods, as we hold, as warehouseman, it devolved upon the plaintiff, in order to maintain her case, to prove that the company was guilty of negligence resulting in the loss of the goods.

The petition as it was originally drafted and upon which the parties went to trial undertook to charge the railroad company as common carrier; but after the evidence was in the petition was so amended as to charge the company as warehouseman.

The chief controversy in the case arises upon the question whether there is any evidence tending to show negligence upon the part of the railroad company that would make it chargeable with the loss of these goods as warehouseman.

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The court of common pleas being of the opinion that there was no evidence tending to show negligence, arrested the case from the jury.

On behalf of the defendant in error, our attention has been called to certain authorities which, it is contended, hold substantially that where goods are lost under circumstances like these, where goods are not forthcoming on demand of the bailor and their loss is not accounted for, it is not sufficient for the plaintiff to show that, but that the plaintiff must go farther and show affirmatively that the goods were lost through the negligence of the warehouseman.

From a reading of these cases we are of the opinion that they do not sustain this proposition. One case is found in 14th Allen, 448—the case of Sherman J. Cass v. Boston and Lowell Railroad Company. In that case the company had received and held as warehouseman a certain cask of sugar which was lost. . On the trial of the case, it was agreed that the liability of the defendant as common carrier had ceased at the time of the loss, and an action was brought against it as warehouseman.

When the plaintiff's evidence was in the defendant asked the court to rule that the plaintiff had made out his case and that the defendant was entitled to a verdict. The evidence did not tend to show any negligence upon the part of the warehouseman in the care of the goods unless it was inferable from the mere fact of the loss of the goods. The goods were lost, and the loss of them was unaccounted for. The case then stood before the jury substantially as the case at bar stood at the time it was arrested from the jury.

In the case in 14th Allen, the court refused to rule that the plaintiff had not made out a case.

The defendant then introduced evidence as to the care which they had used in the custody of the property, and after the evidence was all in the defendant asked the court

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to instruct the jury that the burden was upon the plaintiff to show that they had not exercised ordinary care; but the judge declined so to rule and instructed the jury that the burden of showing that the loss of the sugar had not been occasioned by any want of ordinary care and diligence on its part was on the defendant; that it was not bound to show the precise manner in which the loss occurred, and, if it was unable to do so, it might exonerate itself from the burden by showing that the loss did not happen from any negligence or want of proper care on its part.

Chapman, J., delivering the opinion of the court, takes up this first question as to the ruling of the trial judge upon the motion to take the case from the jury, and this is his language upon that:

“The court are all of the opinion that the refusal to order a verdict for the defendant at the trial was right. The plaintiff's evidence showed that the defendants had received the property, and, on demand, failed to deliver or account for it. There was nothing in this evidence to show that they had any reason for not delivering it — or that any cause but their own neglect or default prevented the performance of their contract. There was certainly a case to go to the jury.”

Then Judge Chapman takes up and discusses the other question as to the correctness of the ruling of the trial judge upon the question of the burden of proof, and the majority of the court in that case were of the opinion that the trial court was right upon that proposition. But Bigelow, Chief Justice, dissented.

The case of Willett and Another v. Rich and Another, reported in the 7, Northeastern, at page 776, overrules Cass v. R. R. Co. upon that second proposition, but does not, as we understand the case, touch upon the first proposition discussed and decided by the court there. The syllabus in this case reads:

“In an action of contract against a warehouseman to re-

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cover damages for injuries to goods intrusted to him, the burden of proof is upon the plaintiff to show that the goods were injured by the negligence of the defendant while they were in his custody; overruling *Cass v. Boston & L. R. R. Co.* 14 Allen, 448."

In the opinion in this case, Morton, Chief Justice, uses language which indicates that his views are in harmony with the views of the court in *Cass v. R. R. Co.* upon that first proposition, i. e. as to whether or not a prima facie case had been made out by showing the delivery and receipt of the goods and the subsequent demand for the goods and the failure to deliver them.

This language is used on page 778:

"It may be that, where there is a refusal to deliver, the plaintiff may make out a prima facie case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden, originally on the plaintiff, to prove a breach of contract. The burden of proof still remains on the plaintiff."

It seems to us that there has been some confusion in the discussion of this case as if it involved a consideration of a question of the burden of proof. We do not understand that such a question is here at the present moment. The real question is whether or not a prima facie case was made out that should have been submitted to the jury — whether there was any evidence tending to support all the material allegations of the petition, and therefore requiring that the case should be submitted to a jury.

In the case of the *New York Life Insurance Company v. La Boiteaux*, 4th Record, page 1, found in *Bates Digest*, 1st volume, p. 950, this is said:

"The burden of proof does not shift as the weight of evidence alternates. The presence of presumptions and the necessity of counteracting them by proof pertains to the weight of evidence, and not to the burden of proof."

We are of the opinion that the ruling of the court as to

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the burden of proof in Willett and Another v. Rich and Another, in the 7, Northeastern, supra, is correct, but that does not at all affect the ruling of the court in the first case upon the other proposition as to whether or not a case was made out that required that it should be submitted to a jury.

Our attention is also called to a case reported in the 2nd Southern Reporter, at page 255. It is the case of the Illinois Central Railroad Company v. Trounstone and Others. This also was cited in support of the position of counsel for defendant in error upon the question of the burden of proof.

The first proposition of the syllabus reads as follows:

“In an action against a railroad company for loss of baggage delivered to it for shipment, the court gave an instruction to the effect that, if the goods were delivered to the agent of defendant to be carried over its road to a certain point, whenever plaintiff’s salesman ordered them to be shipped, and they were burned before shipment, then it was incumbent on defendant to show that they were burned *without any fault* on its part. Held, that the instruction was erroneous, whether on the theory of a bailment for hire or a gratuitous bailment.”

Upon the first reading of that it would seem that the court had instructed the jury that upon the facts recited appearing the burden of proof would shift; that it would then devolve upon the warehouseman to introduce some evidence exonerating itself from liability. But that is not what was in fact charged. The words that are italicized in this syllabus are, “*without any fault*”.

The fault with the charge was, as found by the supreme court, that it imposed too high a degree of care upon the warehouseman. In the opinion, it is said:

“Under the facts assumed by this instruction, a higher degree of proof and care was imposed on appellant than is required by law. Whether, under these facts, appellant would have been a gratuitous bailee, or a bailee for hire, it

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was not liable for any, even the slightest, fault or want of care. If a gratuitous bailee, it was liable only for gross negligence, and, if a bailee for hire, only for reasonable and ordinary care."

Whereas, the instruction was to the effect that if it had been guilty of *any* want of care, even the slightest, it would be liable.

As the only criticism of this charge is with respect to the degree of care which the rule therein stated imposed upon the bailee, the decision by plain implication approves the proposition that under the circumstances recited it was incumbent on the bailee to show that such care was exercised as the nature of the bailment required of the bailor. But this goes farther than we need go in this case.

A majority of this court are of the opinion that the case referred to in 14 Allen is an authority which supports the contention of the plaintiff in error, that the rule there stated is reasonable and just, that the cause should have been submitted to the jury, and that the court erred in directing a verdict for the defendant. For that reason the judgment will be reversed.

KING, J.: I cannot concur in the judgment reversing the court of common pleas, nor in so much of the opinion of a majority of the court as holds that this record discloses any evidence that ought to have been submitted to the jury showing a delivery of the box of goods in question and its acceptance by the railroad company.

*G. R. Walker*, for Plaintiff.

*C. P. & L. W. Wickham*, for Defendant.

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Hutchinson v. McCarron et al.

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(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1899.)

Before Smith and Swing, JJ.

M. T. HUTCHINSON v. CATHERINE A. McCARRON et al.

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*Conveyance to guardian individually of land bought with wards' money —Innocent holder of mortgage and notes for balance of purchase money superior to equitable lien of wards—*

Property was purchased by a guardian by order of court with the money of his wards, but the deed was executed in the name of the guardian individually, who gave his individual notes and mortgage for the balance of the purchase money, the understanding being that the guardian would afterwards convey to the wards, of all of which the vendor had full knowledge. The deed actually so made by the guardian to the wards, however, was never delivered to them, and afterwards the guardian conveyed the land to his wife who made an assignment for the benefit of her creditors, and the assignee commenced proceedings to sell the land. The vendor of the land had before that assigned the mortgage and notes to different innocent parties. Held, as between such innocent assignees of the mortgage and notes, and the wards, that the lien of such assignees of the mortgage and notes was superior to the equitable lien of the wards.

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Error to the Court of Common Pleas of Warren county.

SMITH, J.

We are of the opinion that the judgment of the court of common pleas was right, and should be affirmed.

The controversy arose over the distribution of the proceeds of a tract of land sold by Hutchinson, assignee of Mrs. McCarron, to pay the liens thereon. It appears from the finding of facts that this real estate had been sold and conveyed by Levi Mills, as assignee for the benefit of creditors of Mrs. Hyatt, to James T. McCarron for \$5,500. Mr. McCarron paid \$1,500 in cash and gave notes for the residue secured by a mortgage on the real estate, which was duly recorded. Afterwards he paid \$500 on one of the notes, and subsequently to this payment, Mills transferred the notes, indorsing them without recourse to different persons, they paying full value therefor and taking them



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without any knowledge of an equity in the land or those notes of any other person than the mortgagee.

Before McCarron contracted to buy the land from Mills, he had been appointed as the legal guardian of Ruth, Henrietta and Frank McCarron by the probate court of Brown county, Ohio, and had been by that court authorized and empowered to use \$2,000 of his wards' money in the purchase of real estate, the title to which was to be taken to said James T. McCarron as guardian, and Mills had been advised of those facts. McCarron wanted to buy this land as guardian, but Mills would not make such an arrangement, but told him he could buy it in his own name—make the cash payment and execute the notes and mortgage for the deferred payments, and then convey the property to the children. This course was pursued, and McCarron executed the notes and mortgage and paid \$2,000 of his wards' money to Mills on account of the purchase money, and Mills knew that the money was in McCarron's hands as guardian of said minors. He, (McCarron) and his wife, subsequently executed a deed for the land to the children, but it was not delivered to them. Afterwards McCarron conveyed the land to his wife, and she made an assignment of her property to Hutchinson for the benefit of her creditors. Hutchinson commenced proceedings for the sale of the real estate to pay the liens thereon, and the mortgagee and his assignees and the minors were made parties and set up their respective liens—the claim of the minors being that they had an equitable claim to the land by virtue of the facts stated, and that Mills knew this when he took his mortgage, and therefore it was superior to his claim on the mortgage, and to that of his assignees. It also appeared that when Mills assigned the notes to the purchasers, he did not at the same time or until some time afterwards indorse and transfer the mortgage itself to his assignees.

As against McCarron himself, unquestionably the minors,

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by virtue of the facts stated, had an equitable lien on the land which the court would enforce for the purchase money they paid on the land, and the same would be the case, we suppose, as to those persons who afterwards had acquired title to or an interest in the land from McCarron, with knowledge of the facts. But would they be entitled to such relief as against Mills or those to whom he assigned the notes and mortgage? We think not. Suppose the land had been conveyed to McCarron as guardian of these minors, and he had used \$2,000 of their money in making the cash payment and given his notes and mortgage for the deferred payments. Would not the mortgage lien be the first and best one on the property? The interest of the minors then would be subject to the mortgage lien for the purchase money—and we think the same rule should apply here and any equitable lien of the minors be postponed to the legal lien of the mortgagee. The execution of the deed and the mortgage is one transaction. McCarron took the land subject to the legal lien of the mortgage, and the equitable lien of the minors was subject thereto, even as against Mills, and therefore as to his assignees to whom he transferred the notes, thereby transferring an interest in the mortgage. But a transfer of the mortgage itself was afterwards made.

Judgment below affirmed.

*Burr & Brandon*, Attorneys for McCarron heirs.

*F. M. Clevinger*, Attorney for the Assignees of mortgage claims.

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**Sanders v. Shepherd.**

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(Sixth Circuit—Huron Co., O., Circuit Court—Jan. Term, 1899.)

Before King, Haynes and Parker, JJ.

**EDMUND L. SANDERS v. SARAH E. SHEPHERD.**

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*Contract with married woman—Liability—*

- (1.) The statutes, sections 4996 and 5319, providing in effect that a married woman shall be sued as if unmarried, and that when so sued like proceedings shall be had and judgment rendered as if she were unmarried, afford the exclusive remedy for enforcement of the contracts of married woman.

*Same—Equity now without jurisdiction to give specific lien on property of married woman—*

- (2.) Courts of equity have no jurisdiction to decree a specific lien on particular property for an amount due on the contract of a married woman made by her since the enactment of those statutes.

*Same—Action at law—*

- (3.) A suit on such a contract is, under those statutes, at law, and the relief is a personal judgment enforceable by an execution and levy.

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KING, J.

Error to the Court of Common Pleas of Huron County.

This is a proceeding in error brought for the purpose of reversing the judgment of the court of common pleas. One Levi Lee began an action against Hannah E. Ward in September, 1885, on two notes that were held against her, one dated September 1st, 1881, for, \$100, and one of March 10, 1882, for \$30.

He alleged, and his petition showed upon the face of it, that said Hannah E. Ward was surety on each of these notes, and was a married woman.

Such proceedings were had in that action that in November of 1885, the court rendered this decree:

“Now comes the plaintiff by his attorney, and the demurrer of the defendant to the plaintiff’s petition having been overruled and the defendant being in default for answer, the court find that the allegations of the petition are confessed by her to be true, and that the defendant is indebted to the plaintiff in the sum of One Hundred and Sixty-four and  $\frac{13}{100}$  Dollars. The court further find as alleged in the petition

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that said defendant was at the time of incurring said liability a married woman; that she was possessed of the property in the petition described as her own separate estate, and that she intended to and did charge the same with the payment of said indebtedness. It is therefore considered by the court that unless the said defendant shall within ten days from the entry hereof pay or cause to be paid to this plaintiff the said sum of \$164.13, together with interest thereon at the rate of eight per cent. and his costs herein expended, said premises shall be sold as upon execution and an order shall issue therefor to the sheriff of said County of Huron, and that said Sheriff bring the proceeds of said sale into court for its further order."

That was the decree, as appears upon its face, declaring this amount that was due, a lien upon the specific estate of Hannah E. Ward, and ordering it sold to pay up the lien. It appears that after that, an order of sale was issued and returned immediately by order of the plaintiff's attorney, and that on October 23, 1890, an execution was issued to the sheriff, and that was returned by order of the plaintiff's attorney but not until a levy had been made upon the real estate described in the petition, to-wit, lots 68 and 69, in the town plat of the village of North Fairfield, Huron county, Ohio.

The defendant in error, Sarah E. Shepherd, was defendant below, and the agreed statement of facts on which the case was submitted to the court below, shows that she is the owner by inheritance, of the decree or whatever there is of this judgment—the decree that was rendered in favor of Lee.

The plaintiff in error, Sanders, on November 2, 1888, took and received a note of one Horace Ward, who assigned to him for that purpose, a note and mortgage as collateral security for this note. The note assigned as collateral security was executed by H. E. and Volney Ward, and was dated March 3, 1888. The note was for \$110 secured by mortgage on these premises — lots 68 and 69 on the town plat of the village of North Fairfield, executed by Hannah Ward.

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The question submitted to the court below was, which of these claims was the prior lien upon this property. The court below held that the decree rendered in 1885, being prior in date, was the prior lien upon these premises. It is contended here that that holding was incorrect, the argument being that the statutes of Ohio have, by their enactment, changed the method of procedure against married women, so that in order to sue her now upon a claim like this — upon a note or a contract for the payment of money, she must be sued as a feme sole, and such judgment rendered against her as though she were unmarried, or such proceedings had as though she were unmarried; that this legislation has effected a complete change from the former equitable proceeding which was or might be brought where a married woman was liable to have her separate estate charged with the payment of a claim in equity. The proposition, when submitted, was new to me, and I think it struck the court as different at least, from what we had supposed the law to be.

The statute in force when this indebtedness was incurred is found in the 76th volume of Ohio Laws, page 3. It was enacted in 1879, 76 Ohio Laws, p. 3, and provides that:

“Where a married woman is a party, her husband must be joined with her, except that where the action concerns her separate property, or is upon a written obligation, contract or agreement, signed by her, or is brought by her to set aside a deed or will, or is brought by her to collect a legacy; or, if she be engaged as owner or partner in any mercantile or other business, and the cause of action grows out of or concerns such business, or is between her and her husband, she may sue or be sued alone. And in all cases where she may sue and be sued alone, the like proceedings shall be had, and the like judgment rendered and enforced in all respects as if she were an unmarried woman”.

That was repealed and re-enacted in 1884, and is found in volume 81, at page 65. I should say that in the mean time, there had been a revision of the statutes which divides that section into two sections, and the revision known as

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4996 and 5319 was in force from 1880 to 1884, and at the commencement of this action, the statute read as follows, (section 4996):

“A married woman shall sue and be sued as if she were unmarried and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband.”

Section 5319 reads as follows:

“When a married woman sues or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions to heads of families.”

Under that statute, the supreme court have rendered some decisions. I can only briefly refer to them, and the first is in the 46th Ohio St. at page 183. The court say, on page 191, (speaking of the case before them):

“If no personal judgment could have been awarded against her and enforced by execution, it might have been proper to invoke the remedy in equity of specifically subjecting her separate property. But under the statutory provisions herein considered, authorizing a personal judgment against a married woman followed by execution where the action concerns her separate estate, an effective remedy is afforded, and a creditor should not, by adopting the form of chancery procedure where he has no specific lien, be permitted to hold her separate estate to any greater extent, or by a firmer grasp, than he could, under like conditions, hold the property of her husband or that of an unmarried woman.”

In the 47th, Ohio St. at page 423, is cited a case which was an action upon an agreement incorporated, or alleged to have been incorporated, in a deed. A husband purchased certain lands and gave a mortgage upon it for the purchase money, and while that mortgage was outstanding, he, through a trustee, conveyed this land to his wife. The mortgage was foreclosed and the property sold, but did not sell for enough to pay the mortgage. By supplemental petition in the same

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action it was alleged that as part consideration for the conveyance to the wife, she did then and there assume the payment and discharge of the promissory note and money evidenced thereby which are set up in the original petition, and made the indebtedness evidenced thereby her own debt, and agreed to pay for and discharge the same.

It was contended that that did not constitute a cause of action against her. The court say:

“No particular form of words is required to constitute a good pleading. It is sufficient if the necessary facts are stated. In this case the allegations of the petition show that Mrs. Haines purchased and received a deed of the property described, and entered into possession of it. This showed that, under section 3108, the land was her separate estate, and, with the further allegations that the indebtedness referred to was a part of the consideration for the conveyance which she agreed to pay, showed such circumstances as justified the inference that she intended to charge her separate estate with its payment; otherwise, the transaction on her part was meaningless. No rule of good pleading was violated by omitting to aver, in direct language, that she intended to charge her separate estate. The supplemental petition made a case against her.”

In the 50th, Ohio St., beginning on page 17, the court in rendering its opinion, say:

“It is contended in behalf of the plaintiff, that under the statutes in force in the year 1886, an action was maintainable in equity to charge the separate estate of Mrs. Stange—a non-resident of this state—upon her alleged liability under the written agreement entered into between herself and the plaintiff; and that the court acquired jurisdiction through constructive service by publication.”

The case turned upon the question whether they had a lien upon this real estate and could maintain an action in equity against it. At the bottom of page 425, the court say:

“If no personal judgment could be rendered against the wife, the obvious remedy of the plaintiff would be, an appeal

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to the court, in the exercise of its equity powers, to lay hold of the wife's separate property, and apply it in payment of her equitable obligations. Although no specific lien was created on her separate property by the written contract; yet, there would be an equitable charge upon her estate, and a liability of it to be taken in payment by decree, as a man's property may be taken on execution."

"But by statutes — in force when the written agreement in question was entered into, and when the original action was commenced — a married woman may now sue and be sued at law as if she were an unmarried woman; and any judgment rendered against her may be enforced as if she were unmarried, and her property may be taken on execution to satisfy such judgment, to the same extent that the property of her husband might be taken in satisfaction of a judgment against him."

I need not follow that opinion, but it concludes that she could be sued only as a man might be sued and as an unmarried woman might be sued; that no jurisdiction over her property could be obtained by filing a suit in equity to charge this upon specific real estate; but she must be sued and personal service had upon her and a personal judgment rendered against her which would be enforced against her as against her husband or against an unmarried woman.

This seems to be the unbroken line of authority which conclusively determines the question; that since the passage of this remedial statute, it provided that when an action was such as concerned her separate estate, that she might sue or be sued alone; and that in every such case, like proceedings should be had and a like judgment rendered as if she were unmarried, and upon the revision of the statute and a separation of that section into two, there has been no exception as to a cause of action that may be maintained against married women; in other words, she can be sued on all those contracts she might rightfully make just exactly the same as if she were unmarried; that is the only way she can be sued, and the only way you can collect against her is to have



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a personal judgment for money, unless you have by contract a specific lien upon real or personal property; so that we are led to the conclusion — novel though it be to us — that the decree which was rendered in 1885, which sought to make this claim of Lee a charge upon this real estate, was to that extent of no effect. The petition in the case did not ask for personal judgment, and no personal judgment was rendered against her and no lien upon her estate was acquired by that decree, because the court did not have the power to decree one, and for that reason, this judgment must be reversed. The decree of this court will be that the claim of Sanders, the plaintiff below, will be the first lien, and order of sale will issue accordingly.

*J. R. McKnight*, for Plaintiff.

*Stewart & Rowley*, for Defendant.

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(Fifth Circuit—Licking Co., O., Circuit Court—April Term, 1899.)

Before Adams, Douglass and Voorhees, JJ.

ROYAL INSURANCE COMPANY v. SAMANTHA WAL-  
RATH.

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*Fire Insurance—Written contract—Verbal promise.*

- (1.) A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing may be given in evidence.

*Same—*

- (2.) Parol evidence is admissible to show what property was included in the contract of insurance; and what was said and done by the parties leading up to the making of the contract.
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Error to the Court of Common Pleas of Licking county.  
VOORHEES, J.

In view of the former holding of this court upon demurrer to the second amended petition, it is sufficiently accurate for the present purpose, and for the exposition of the

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principles of law applicable to the case, to state the following facts:

The defendant in error, on and prior to July 1890, held a policy of fire insurance from the plaintiff in error, on her dwelling house and certain personal property located in Hanover township, this county. That prior to the expiration of the policy of insurance, the insurance company, by its agent, one J. B. Murphy, while in view of the real estate of the insured, solicited her to take out additional insurance on said property, she having made some improvement on the property. Said agent was well acquainted with the property, its location and kind, so insured in said old policy. Prior to the 21st day of July, 1890, the insured was the owner of ten tons of hay, which was then stored in a barn of one Dr. Bukey in said township, which barn was held by her by lease for a term of years.

On said day, and while said agent was soliciting her to take out such additional insurance on her property mentioned in the old policy, he also solicited her to take out some insurance upon said ten tons of hay in said barn, which was located as stated, and in view of said agent. He promised that the old policy should be canceled and a new policy issued, covering said additional insurance, and including said hay; that the unearned portion of the premium on the old policy, should be applied upon the premium upon the new policy, and she to have until September 15th, 1890, to pay the balance of the premium. The barn in which said hay was, was pointed out to the agent, and he was requested to go and see the hay. He said it was unnecessary, and declined to go. He was informed by plaintiff that the barn was owned by Dr. Bukey; that she had only a lease upon it. Said agent then informed the plaintiff that he would put said hay in said new policy, insuring it for the sum of fifty dollars, and agreed with her that he would at once make out the policy so as to include the hay,

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and would issue the policy as soon as he got back to his office in the city of Newark; and that he would deposit it with the building association, under the same arrangement as existed with the old policy, on account of a mortgage held by the association.

The plaintiff never saw the policy until after the hay was destroyed by fire. Defendant company knew at the time it so solicited the plaintiff to insure this hay, and at the time it issued its said policy, that the plaintiff owned said ten ton of hay, and owned no other hay, nor was she in the possession of any other hay. Said agent went to his office and issued the policy, which is attached to the original petition, taking up the old policy, and applied the unearned premium thereon to the payment of the premium on the new policy, and delivered it over to the building association. Plaintiff performed the requirements and conditions of the policy on her part.

On the 11th of September, 1890, said hay was totally destroyed by fire, of which defendant had due and proper notice. That by said policy, defendant did insure the plaintiff's said hay for \$50.00. That she was the owner at the time of the insurance, and continued to be the owner up to the destruction of the hay by fire. After said hay was burned, on the 12th of September, 1890, and after defendant knew it was so destroyed, plaintiff paid the balance of the premium on the new policy, and defendant has ever since retained the same. The value of the hay was averred to be \$70.00. The defendant company refused to pay the \$50.00, or any part of it, for which plaintiff asks judgment.

The company by answer took issue with the plaintiff on these facts. and the cause was tried at the January term, 1899, of the common pleas court to a jury, resulting in a verdict in favor of the plaintiff below for the sum of \$74.98, upon which verdict a judgment was rendered at said term.

Error is prosecuted to this court. A number of grounds

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are set forth as reasons why the judgment of the court below should be reversed.

Many of the questions raised by the petition in error are settled as a result of the holding of this court in overruling the demurrer of the defendant below to the second amended petition; and it will not be necessary to further consider them. If the holding of this court in overruling the demurrer was correct, there is no error in the record in the particulars complained of in these several grounds of error.

Walrath v. Royal Insurance Company, 16 C. C. R., 413.

The only question now to be considered is, whether the verdict of the jury and judgment of the court below are sustained by sufficient evidence, or were contrary to law.

In other words: Does the amended petition state a cause of action against the defendant below? Second: Were the material facts of the petition established by legal evidence? If so, the judgment of the court below should be affirmed.

That the petition sets forth a cause of action, was settled by this court when it overruled the demurrer of the defendant to the petition; and a majority of the court see no sufficient reason for changing that holding.

The next question is: Were the facts set forth in the petition established by the evidence, so that the verdict of the jury is not against the weight of the evidence?

The rule of law in this state is, that a verdict or finding of a court will not be reversed on the weight of evidence unless so clearly unsupported by it as to show misapprehension or mistake, or bias, or willful disregard of duty on the part of the jury. Of course, this presupposes that the evidence upon which the verdict rests was competent and legal evidence. And this leads to the real question of contention in this case, viz: Was it competent for the plaintiff below to prove, by parol evidence, the facts set forth in her amended petition?

The cause of action of the plaintiff is founded upon a

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written contract, an insurance policy. Notwithstanding this, it does not follow that testimony as to what was said and done by the parties, leading up to the making of the contract, is inadmissible for the purpose of showing what the real contract of the parties was; and this may be done without first invoking the equity power of the court to reform the contract.

We are not unmindful that, among the purely artificial rules of evidence, one is, to forbid parties to a solemn contract reduced to writing, to alter, vary, limit, enlarge or contradict what they have thus made certain, by the recollection of witnesses, in attempting to show what the parties said before or at the time of the signing of the contract. This wise policy or rule of evidence, we are not inclined to doubt. But after a careful examination of the evidence in this case, we have deemed it our duty to consider that other rule of law, which gives the court and jury the right to take into consideration as legal evidence the parol statements made contemporaneously with the execution of the contract, so that the contract may be read and construed in the light of the circumstances appearing in evidence at the time of its execution; and that the jury may so construe it under the direction of the court.

Therefore, in the case at bar, parol evidence was admissible to show what property was included in the contract of insurance. From the evidence in this case, there can be no doubt but that the hay in the Bukey barn, which was held by lease by the plaintiff, was to be included and covered by the policy; and either by design or inadvertence of the agent of the company, it was not definitely expressed in the contract. Who should suffer by this act or omission of the agent?

The plaintiff was free from fault, and the neglect of the company's agent should not be visited upon her when disaster has come, which she, by the insurance policy, was

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trying to guard against; and the case comes within the rule of modern decisions which hold, that when a writing is produced, either as evidence, or as the foundation of an action, and it does not express the agreement of the parties, the party who caused it to be in an imperfect condition should be estopped from using it, or relying on its contents as expressing the unalterable agreement of the parties; and that parol testimony is competent to show the real transaction, so that the writing or contract as written cannot be used to the injury of the party whose agreement the writing does not express.

In the case of *Powelson Coal Company v. McShain*, 75 Pa. St, 238-245, the court say:

“It is certainly permissible to give evidence of a verbal promise made by one of the parties, at the time of the making of a written contract, where such promise was used as an inducement to obtain the execution thereof: *Campbell v. McClenachen*, 7 S. & R., 171. This rule is put upon the ground that the attempt afterwards to take advantage of the omission from the contract, of such promise, is a fraud upon the party who was induced to execute it upon such promise, and hence he will be permitted to show the truth of the matter: *Clark v. Partridge*, 2 Barr, 13; *Renshaw v. Gans*, 7 Barr, 117; *Dutton v. Tilden*, 1 Harris, 49”.

In the case of *Maril v. Connecticut Fire Insurance Company*, 95 Ga., 604, s. c., 51 Am. St. Rep., 107, the court states the rule thus:

“While parol evidence is not admissible to vary the terms of a contract in writing, it is admissible for the purpose of applying the terms of the writing to the subject matter, and removing any ambiguity arising from such application; *Stoops v. Smith*, 100 Mass. 63. It is admissible to explain an ambiguity, whether latent or patent *Shore v. Miller*, 80 Ga., 93; s. c. 12 Am. St. Rep., 239.”

In *Gould v. Boston Excelsior Company*, 91 Maine, 214; s. c. 64 Am. St. Rep., 224, the court say:

“It is well understood that parol evidence is admissible to explain a writing, to make its terms definite, to fill out an

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Royal Insurance Co. v. Walrath.

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incomplete contract, to show the circumstances under which it was made, and to prove a collateral, contemporaneous, or subsequent agreement not inconsistent with the written agreement. *Harris v. Murphy*, 119 North Carolina, s. c. 56 Am. St. Rep., 660-661 and note; *Durkin v. Cobleigh*, 156 Mass., 108, s. c. 32 Am. St. Rep., 436, and note."

In the case of *John B. Ferguson v. Thomas L. Rafferty* reported in *Lawyers Reports Annotated*, Book 6 p. 33, the supreme court of Pennsylvania held:

"That parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change or reform the instrument."

To the same effect is the case of *G. W. Walker v. W. B. France*, reported in 2 Central Reports, 781.

The principles of these cases have been recognized by the supreme court of this state in the case of *Springer Brothers v. George W. Henry et al.*, decided December 20th, 1898, reported in 40 Bull., 412, wherein the court reversed the circuit court and affirmed the common pleas without report, the circuit court holding that the common pleas erred in admitting testimony as to what was said and done by the parties leading up to the making of the contract.

If the testimony was competent in this case, showing what really occurred in regard to the hay in the Rukey barn, between the plaintiff and the defendant's agent, there is evidence to support the finding of the jury.

And, in the opinion of a majority of the court, this evidence was competent; and the verdict of the jury is supported by legal evidence, and is not contrary to law.

And this disposes of all the questions raised by the petition in error, not determined by the former holding of this court on demurrer.

The judgment of the common pleas is affirmed.

Adams, J., dissenting.

*Follett & Follett*, for Plaintiff in Error.

*S. M. Hunter*, for Defendant in Error.

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**Ampt. a Taxpayer, v. City of Cincinnati and August Hermann et al.**

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(First Circuit—Hamilton Co., O., Circuit Court— Jan. Term, 1899.

Before Smith, Swing and Giffen, JJ.

**WILLIAM M. AMPT, a taxpayer, on behalf of the city of Cincinnati, v. THE CITY OF CINCINNATI and AUGUST HERRMANN et al., trustees and commissioners of the waterworks of Cincinnati.**

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*Commissioners to build the new waterworks for the city of Cincinnati—Contracts by—Plans and specifications—What sufficient—*

The act of the legislature of Ohio, 92 O. L. 608, providing for the appointment of commissioners to build the new waterworks for the city of Cincinnati, provides that "said commissioners shall, before entering into any contract, cause plans and specifications, detailed drawings and forms of bids to be prepared, and careful estimates of cost to be made; and when adopted by them, they may, in their discretion, cause the plans and drawings to be multiplied and printed, by photographing, lithographing or other suitable process, and the specifications and forms of bids, contracts and bonds to be prepared, and have the same printed for distribution among the bidders." Held, that the drawings and specifications need not go to the minutest detail in which every part of the machinery was to be drawn and specified; but it is sufficient to give specific and minute specifications as to what the machinery was to accomplish, the exact kind of material to be used, the manner in which all the work should be done, and the exact nature and kind of all the parts which were given, how all such machinery should be constructed, such as valves, riveting, bolts, etc.

*Same—Delegating powers to engineer—*

(2.) The action of the commissioners in delegating certain of their powers to the chief engineer to determine as to certain matters, is not such a delegation of power in the sense that it is a taking away from the commissioners the power vested in them. The duties the chief engineer performs are done as the agent and employe of the trustees. He uses his technical knowledge as their agent, and he is entirely subject to the control of the trustees, and what is done is by their authority, and is under their control, and his exercise of this power is their exercise of it.

*Same—Provisions for alternative bidding and for changes—*

(3.) There can be no objection to the provision in the contract as to alternative bidding, nor to the provisions therein by which alterations and modifications in the contract are provided for. In practice such changes have always been found necessary, and in the nature of things must be.



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Ampt, a Taxpayer, v. City of Cincinnati and August Hermann et al.

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Appeal from the Court of Common Pleas of Hamilton county.

SWING, J.

This is an action in this court on appeal. It is an action by a taxpayer on behalf of the city of Cincinnati against the city and said August Herrman and others, trustees and commissioners of waterworks of said city, and is brought to enjoin the performance of a contract heretofore entered into between said trustees for said city and The Lane & Bodley Company, whereby said company had contracted to furnish to said city certain waterworks pumping engines, boilers, etc., an electric crane and an elevator in connection with the building of new waterworks by said trustees for said city.

This action is brought by Mr. Ampt in good faith and in a friendly spirit with a view to having very important questions involving large amounts finally determined.

The petition and the amendment to the same contain nineteen pages of typewritten matter, and the answer contains eighty-nine pages of printed matter. No attempt will be made on this occasion to set forth at length the statements in either. It would occupy too much time, and besides a proper understanding of the real objections to the contract can be arrived at without it.

The claim of the plaintiff is thus summarized by him in his petition:

"Plaintiff says that by reason of the failure of the commissioners of the waterworks to provide for and adopt plans and drawings for said engines and electric crane before entering into said contract and by reason of failing to provide complete, full and exact specifications therefor, said contract is void as an entirety. Further, that for the additional engine and the electric crane it is void because neither of said items of work was named in the advertisement calling for sealed proposals."

There is no question of bad faith raised. No bidder is complaining that the contract awarded is not to the lowest and best bidder; that the advertisement for bids was not

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Ampt, a Taxpayer, v. City of Cincinnati and August Hermann et al.

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properly made so as to give to bidders the best opportunity to frame their bids thereon and at the same time obtain for the city the most favorable bids for the best work to be furnished. In fact, in every way it is conceded that the contract is most favorable to the city. In the first place, the contract was given to a home concern, and while this fact could make no difference in awarding the contract, as the lowest bidder only could be considered, still everyone must feel that it was fortunate for the city that the work was to be done here. It furnishes employment for men who must help pay for it, and in that way contributes to the happiness and welfare of the city, and at the same time the taxpayer is protected.

Then again it was asserted and not denied at the hearing of the case, that if this contract is set aside and another one made, the latter will probably exceed the former by at least twenty per cent in cost.

The course pursued by the trustees in this matter was not determined upon until after the trustees had communicated with all the builders of such work in the United States and got their idea as to the proper way to formulate an advertisement for bids. They also asked for and received advice from the Chamber of Commerce, the Business Men's Club, and all other public bodies of said city, which would likely be interested in the matter. The opinion expressed by all these was the same. It coincided with the views of the trustees and their engineers, and it resulted in the trustees adopting the course pursued. The great pains displayed by the trustees in endeavoring to arrive at a correct conclusion as to this important matter certainly entitled them to commendation. The difficulty that confronted them arose when they attempted to construe the statute with reference to the subject matter of the pumps and engines. This provision of the statute is found in 92 Ohio Laws, 608, and is as follows:

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“Said commissioners shall, before entering into any contract, cause plans and specifications, detailed drawings and forms of bids to be prepared, and careful estimate of cost to be made; and when adopted by them, they may, in their discretion, cause the plans and drawings to be multiplied and printed, by photographing, lithographing or other suitable process, and the specifications and forms of bids, contracts and bonds to be prepared, and have the same printed for distribution among the bidders.”

To what extent were detailed drawings and specifications to go? Must it be the minutest detail in which every part of the machinery was to be drawn and specified, or was it sufficient to give specific and minute specifications as to what the machinery was to accomplish, the exact kinds of material to be used, the manner in which all the work should be done, and the exact nature and kind of all the parts which were given, how all such machinery should be constructed, such as valves, riveting, bolts, etc.? The specifications of this class cover sixteen pages of printed matter, and as far as it goes it is as specific as it could well be. The detailed drawings and specifications, however, did not go to the extent of showing in detail every part and proportion of the work. What is called the “working plans” of this machinery will cover more than a thousand pages.

The question is: Did the law require that the specifications and drawings should go to this extent? Possibly to give the law a literal interpretation would require the detailed drawings and specifications to include each and every part of the machinery, and in doing this the trustees might have omitted to require that the machinery should perform certain work, as they did do; for by this contract each of the pumps must have a capacity to pump thirty million gallons of water every twenty-four hours, and must stand the test of one hundred and eighty million gallons of water in six consecutive days; and furthermore must perform the

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work required of it for one year to the satisfaction of the trustees; and during that time all alterations and repairs are to be borne by the builders.

Certainly what the trustees wanted to get for the city was engines and pumps that would pump a certain quantity of water in a given time. It was wholly immaterial to them where each nut, bolt, valve and piece of material was to be located. All such details were non-essentials. It is to be borne in mind that these engines and pumps were to be made to do a certain work. In one sense, they were not inanimate like a house or building, but they had a great work to perform, and it must be done in the most economical and approved way. What the trustees did was to leave out the non-essentials in their specifications and drawings, but all the essentials of the result desired, as to the capacity of the pumps to perform the work required, and the manner of the workmanship, and the materials to be used in their construction, are most specifically looked after and detailed.

In construing statutes it is a well known and valuable rule of the law that a thing may be within the law and yet not within the letter of the law, and a thing may be within the letter of the law and still not within the law; and so it seems to us in this case that it is within the letter of the law that these specifications and detailed drawings mentioned in the statute should give every detail of every part of this great and complex machinery, but we do not believe it is within the meaning of the law that they should do so.

The first object of the law was to afford to the people who were to pay the cost of this work the assurance that it should be done for the least amount of money, and these provisions were placed there to bring about this result. Of course, the law is founded upon the theory that the people are to get work which is the best possible to be had. Bearing these two fundamental ideas in mind we apply them to the subject matter.

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The machinery required for this work is only capable of being built by ten firms in the United States. Of these eight were bidders on this work. The difficulty that presented itself at once to the trustees in making exact drawings and specifications of every part, was this: Machinery of this magnitude has as yet not reached that state of perfection, and probably never will, where all builders build to any certain and fixed plan as to details. In this respect each builder has his own detailed plans, and no two are alike, and their tools and patterns are made to produce their own work after their own plans; therefore, if the detailed plans of this complicated work was to be given in all of its parts, the trustees were either compelled to adopt the plans of one of the concerns which had produced such work, or else get up a plan of the same kind of their own. It will be seen at once that the object of the law would be defeated if the board were to adopt the detailed plans of any one of the firms, for this would virtually destroy all bidding by firms other than the one whose plan was adopted, and place the trustees at the mercy of that firm. The price to the city would in all probability be much greater than it should be. This would destroy competition in bidding, the very thing the law was intended to bring about, and this must not be except from necessity.

But a still greater difficulty met the trustees in getting up a detailed plan of their own. The evidence showed that at the present time there is only one such pump in operation in the United States although numerous such pumps have been built, but only to prove costly failures. And no city is able to furnish a better example of this than the city of Cincinnati with its celebrated Shields pump, which has cost the city thousands upon thousands of dollars, and is now perfectly worthless, its only value being as old junk.

In the first place, the work and time required to produce these plans is very great, the testimony of the chief en-

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gineer being to the effect that it would require a year and a half to do it. And in the next place, no firm could construct such machinery so well or so cheaply as it could machinery of its own pattern and design. And then lastly, which is the most important of all, it would when constructed be more or less experimental, and might not perform the work required of it.

To pursue either plan it was apparent would certainly defeat the intent and purpose of the law and impose a great expense upon the city, the only excuse for which would be an attempt to adhere to the letter of the law. To do this we think would be sticking in the bark. It would be sacrificing the purpose and essence of the law. No one is complaining that the trustees have not acted with the greatest care and wisdom in the matter, or that the rights of the people have not been most carefully guarded, or that the very best results possible have not been obtained. The only claim that can be justly made is that the letter of the law has not been followed, and the answer is that it should not be followed, and that the real purpose of the law would be defeated by adhering to it.

The other questions raised in the case we consider as of a minor importance, and shall only notice a few of them briefly.

The objection that the fourth engine and the crane were not in terms mentioned in the advertisement we do not regard as fatal to the contract. They were carefully mentioned in the specifications, and there can be no question but what all bidders were fully informed as to the work desired, and no bidder is complaining. It would be idle speculation to say what might have been the result if these matters had been set forth at length in the advertisement. As already said, eight of the ten builders of such work in the United States were bidders, and all these bid with a view to such specifications, and must have been fully informed as to the same.

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As to the further question that the trustees delegated certain of their powers to the chief engineer to determine as to certain matters, we do not consider that there was such a delegation of power in the sense that it is a taking away from the trustees the power vested in them. The duties the chief engineer performs are done as the agent and the employe of the trustees. He uses his technical knowledge as their agent, and he is entirely subject to the control of the trustees, and what is done is by their authority, and is under their control, and his exercise of this power is their exercise of it.

We see no objection to the alternative bidding, nor do we see any objections to the provisions in the contract that alterations and modifications in the contract are provided for. In practice such changes it has been found have always been necessary, and in the nature of things must be. This provision is for the protection and benefit of the city. Changes are constantly made in such work. The chief engineer testified that in the last twenty-five years changes had been made in the construction of such work to the extent that engines and pumps of the same class do three times the work that was formerly done by them. It is not at all likely that we have reached perfection now. In all likelihood improvements will be made in the future as in the past, and it was with a view to obtain for the city the advantages of such improvements that such provisions were inserted in the contract, and we can certainly see no objection that can be properly urged by the city why it should not be thus protected. If it could be in reason urged that it might injure the city, the case would be entirely different.

The petition of the plaintiff will be dismissed.

*W. M. Ampt*, for Plaintiff.

*Ellis G. Kinkead*, Corporation Counsel.

*Wade H. Ellis, J. B. Frenkle, Thos. McDougall*, contra.  
(Affirmed by supreme court, without report, May 16, 1899.)

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The South Kenton Union Sunday School Ass'n. v. Espy et al.

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(Third Circuit—Hardin Co., O., Circuit Court—Feb. Term, 1899.)

Before Price, Norris and Day, JJ.

THE SOUTH KENTON UNION SUNDAY SCHOOL ASSOCIATION v. THOMAS ESPY et al.

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*Religious association—Trustees without power to dispose of property without consent of association—*

- (1). Trustees of a religious society or association, organized under the provisions of sec. 3241, of Revised Statutes of Ohio, without consent and authority from the members of such society or association, and without authority from court first obtained for that purpose, have no power to sell or give away the real property of the society or association.

*Same—Act of legislature unconstitutional—*

- (2). The act entitled "an act to authorize the trustees of the South Kenton Sunday School Association of Kenton, Hardin county, Ohio, to convey by deed the real estate now held by them as such trustees to the Epworth M. E. Church of South Kenton," and passed March 17, 1898, (93 O. L., p. 462), is unconstitutional and void, and the deed made by said trustees in pursuance thereof, is likewise void.
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PRICE, C. J.

Sometime in the year 1879, a number of well meaning men and women of South Kenton, met and organized a Union Sunday School, which was to be non-sectarian in character and teachings, in which would be gathered children of that part of the village from all classes and families, whether connected with any church or not. Members and friends of the different churches took part in this organization and became teachers and officers of the Sunday School, and devoted a part of each sabbath in giving the youth of that vicinity moral and religious training, and exerted their influence on that day, and at opportune occasions during the week, to encourage and build up this non-denominational institution. There, men and women of different creeds and doctrinal faith, and some of no creed, assembled on a common platform for the purpose of promoting the broad principles of christianity and the moral and spiritual welfare



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of the children. At the beginning, and for some time, they met in very humble quarters—a part of a tile factory, but the cause met with public approval, and by small sums collected on the sabbath day, and by donations from friends of the enterprise, the school was furnished with necessary books, an organ and other supplies, and it prospered, having an attendance of seventy-five to one hundred during the years following the organization, and better room was rented for a time, from the board of education.

In the year 1887, it was found that the interests and continued prosperity of the school required more room and better facilities; and after considerable discussion among the members, teachers and officers of the school, it was decided to purchase a lot and erect a building to be occupied by this Union Sunday School.

Thomas Espy, one of the defendants, and who had been a supporter and attendant of the school, owned a lot which was a suitable location, and the purchase price was agreed upon, but the character of title to be conveyed and in whom it should be vested, became a subject of concern, and it was decided by those managing the school, on advise of Espy and others, to incorporate it, and on application of a sufficient number for that purpose, a charter was obtained for "The South Kenton Union Sunday School Association", in the year 1887.

Seven trustees of this corporation were elected—some of whom are defendants, and Espy conveyed the lot to the corporation above named. A building was erected, and both lot and building were paid for in money raised—some by subscription—some by entertainments given by the Sunday School. The donations and subscriptions were solicited and made in support of the plan upon which it was first organized—that it was to be non-sectarian; and when completed the building was so dedicated on Christmas 1887, when ministers of the various churches of the town took part in the services of dedication.

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at all meetings of such corporation, for the election of officers or other purpose, anything in the preceding section to the contrary notwithstanding."

To comply with the law, certain persons applied for a charter, and executed a certificate stating the name and purposes of the incorporation, and in accordance therewith, a charter was obtained and its name appears in its first line: "The South Kenton Sunday School association"; and the purpose of the organization is stated to be "the worship of God in the Sunday school, and the advancement of the cause of christianity."

There is no difficulty in coupling this charter with the labors, self-denial, hopes and wishes of the persons, who had, during preceding years, furnished an occasion for its issue.

Then, we see, that the property in controversy did not belong to the trustees, but to the association, and they had no power or authority to transfer it except it is derived from the real owner and according to the methods prescribed by law. No such consent or authority was ever given and no legal steps were taken to obtain them. But the defendants claim authority under an act passed by the general assembly of Ohio, March 17th, 1898; (93 Ohio Laws, 462).

"Section 1. Be it enacted by the general assembly of the state of Ohio, that the trustees of the South Kenton Sunday School Association of the city of Kenton, county of Hardin and state of Ohio, be, and they are hereby authorized and empowered to sell for such nominal or other consideration as may be deemed just and proper by them, and convey by deed to Epworth Methodist Church of Kenton, Ohio, the real estate now held by them as such trustees, together with all the rights and privileges therein, viz: The east one-third part of inlots 32, 33 and 34 in Thomas Espy's addition to said city of Kenton, Ohio, together with the buildings thereon, and all the furniture in said building belonging to said association "

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The South Kenton Union Sunday School Ass'n. v. Espy et al.

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Section 2. This act shall take effect and be in force from and after its passage."

This is the very generous law and a conveyance made in pursuance thereof, under which the defendants would hold and control this property.

Happily, it is seldom we find such unwarranted and unconscionable legislation. It would wring from the rightful owner, against its will, all it owns, for a consideration not fixed or dictated by it, or for no consideration, as to the trustees might seem best.

To merely say that the law is unconstitutional, is treating it with more consideration than it deserves, because it lacks every element of justice and fair play, and makes a rule that two parties are not necessary to a contract, and that the owner has nothing to do or say while it is being divested of its property.

The Epworth M. E. Church does not possess the right of eminent domain, and if it did, it could not appropriate the property of the plaintiff without first making compensation. What the constitution forbids, the legislature may not do, and it has no more power to give away the property of a citizen, than it has to authorize its appropriation without compensation. In this instance, it was undertaken to cloth men who did not own the property, with the authority to give it away, and under its terms and provisions, the defendants attempted to strip the Sunday school association of every vestige of its property both real and personal.

But all this is of no avail, and it is our duty, not wholly unmixed with pleasure, to declare the special act quoted and the deed made thereunder, void and of no effect to transfer title.

Another ground of defense made in the answer is, that the defendants do not intend to deny the plaintiff of the use of the building, but on the contrary, they propose to construct a better and more commodious building in connection

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The South Kenton Union Sunday School Ass'n. v. Espy et al.

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with the one about to be removed, to which members of the plaintiff association will have cordial and free access; and evidence has been introduced to that effect.

The proposition is complacent in its nature, but it is no defense to this action. It scarcely arises to the importance of an apology for the defendants to say, they will establish the "open door", where all may enter and be made welcome.

Admission there will be admission to a denominational church and Sabbath school, where the tenets and articles of its faith and practice will be taught, and its forms of worship and discipline followed, and where the voice of the plaintiff will never be heard.

Another point made by defendants is, that the plaintiff was not authorized to bring this action, and that no one has been authorized to sue for it.

This claim grows out of the fact, that five trustees refused to have the suit brought, and after it had been commenced, signed a document asking its dismissal.

It may be said in answer to this, that a corporation does not cease at once because some or all of its trustees abandon their trust. It survives for many purposes, and in this case it has some trustees and other loyal friends who would preserve its existence.

Indeed, suing in this instance is the very elixir of life to the plaintiff, or it would lose its property and finally perish.

We find for the plaintiff and perpetually enjoin the defendants from using, removing or otherwise interfering with any of the property described in the petition, and we award to plaintiff \$150 damages, defendants to pay all costs.

Decree accordingly.

*S. T. Armstrong, Crow & Durbin, for Plaintiff.*

*F. C. Daugherty, and Geo. E. Crane, for Defendants.*

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Tillinghast et al. v. Craig.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1893.)

Before Haynes, Scribner and King, JJ.

E. M. TILLINGHAST et al. v. JOHN F. CRAIG.

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*Life insurance—Rebate in premium agreed to by sub-agent appointed by agent of Co.—Violation of statute—*

(1.) T. Bros., being agents of a Life Insurance Company, employed H. as sub-agent. H. arranged with C. to take a policy of insurance from the company, and as an inducement for him to do so agreed to make a rebate on the amount of the premium (giving him note for the premium less rebate). It was afterwards arranged that C. should give a check dated in future in place of the note. The check was not paid, and was sued upon in the action below.

*Held*, (1) That T. Bros. were responsible for the acts of H. in the transaction; (2) That the transaction was in violation of the provisions of the act of the general assembly, found in 86 Ohio Laws, 220, and that the note and check were void in the hands of Tillinghast Bros.

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Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

In this case the Tillinghasts brought suit against Craig to reverse the judgment of the court of common pleas in an action wherein the plaintiffs in error were plaintiffs below, and the defendant in error was defendant below. The suit was brought on a check given by the defendant Craig to Tillinghast Brothers on the Union Savings Bank of Toledo, Ohio. The defendant, admitting the giving of the check, sets up two defenses. He says in short that the check was given in payment of a policy of insurance that it was proposed to procure for him in a certain insurance company for which the Tillinghast Brothers were agents, and was dated in advance under an agreement that if they procured him a policy of insurance and delivered the same to him, and he approved and accepted the same, the check was then to be paid—in short, to procure a policy of insurance subject to his acceptance and approval. When that was done they

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were to have the money. And he avers that they never did procure such policy of insurance, and that he directed that the check should not be paid, and the same is void in plaintiff's hands, and that it is without consideration also. He says for a second defense that at the same time he made an arrangement with regard to the policy of insurance that it was made under an arrangement with the agent that a portion of the premiums on said policy, the premium amounting to \$270.00, should be rebated, in consideration that he would take the insurance, and that there was rebated from that sum the sum of \$74.00, leaving the amount \$200.00 that he was to pay for the first year's premium upon the policy, instead of \$270.00, which was the regular amount which should have been paid. And he says that by reason of these allegations said rebate contract was illegal and contrary to the laws of the state of Ohio, as contained in volume 86, O. L., 220; that he himself did not know at the time that it was illegal, and that for that reason the check was not good in the hands of the plaintiffs.

It appears in substance that this insurance was solicited by a man of the name of Moses R. Howard, who had an agreement with the Tillinghast Brothers to operate for them and they for the society—Tillinghast Brothers being the agents at this point. It appears further that under the agreement that was made between Howard and the Tillinghasts he was to have a certain rate or proportion of the premium for the first year, so this commission would amount, on \$270.00, to quite a large sum of money—25 per cent. perhaps. It further appears that at the time that this arrangement was made between Craig and Howard with regard to this insurance it was proposed by Howard that the sum of \$74.00 should be rebated upon the amount of the premium. Howard says that instead of it being given as a rebate, it was given to Craig on an agreement that he should procure insurance upon the lives of other people, and

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that this sum was to be applied on a sum that was to be allowed by Howard to him for obtaining such insurance, and if there was anything additional to that amount which would be coming to him upon the sum that was to be allowed to him, Howard should pay same in cash. That is denied by Craig. This was a question that was submitted to the jury, and was found in favor of Craig.

Howard sent and got the insurance that was agreed upon as he claimed, but it proved to be a bond, as it is called, in the nature of an endowment policy.

Craig says this was not satisfactory to him, was not what he agreed for at the time. There was quite an amount of correspondence and some more agreements and arrangements and conversations in regard to the matter. That policy or bond was sent back, and it is said that another policy was issued and placed in the hands of Tillinghast Brothers, but they never tendered it to Craig, but allowed it to remain there subject to his order.

At the time of applying for the insurance Craig gave his note for \$274.00, and upon that note was endorsed the sum of \$74.00, endorsing it down to \$200. That was for the amount of the first year's premium upon the policy. During these negotiations that were going on in regard to the policy which was to be delivered, that note became due, and Tillinghast was here and had some conversation about it, and an arrangement was entered into, as was claimed by Craig, whereby he gave this check in question upon that note, but with the understanding and agreement, it being dated in the future, that before it became due the policy should be obtained and delivered to him according to the original agreement, to his full satisfaction and acceptance, and he avers that that was never done, and that upon the check becoming due he stopped payment upon it.

It is contended here very earnestly by the plaintiffs in this case that Moses R. Howard in this matter was not the

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agent of plaintiffs or of the society in such a sense as would make the society responsible, or the Tillinghasts responsible for anything that he might have done contrary to law in regard to the rebate that has been spoken of. It is claimed further by them that there is evidence to show that the Tillinghast Brothers were in fact purchasers of this note before due for a full and valuable consideration, who took it free from any defenses of the kind that are set up here, and that therefore the check was valid in their hands, and not subject to any defense.

We have read the testimony all through, and have given it a very careful discussion. We are of the opinion that Howard was, under the decisions of the supreme court of the state of Ohio, in fact the agent of Tillinghast Brothers in such a sense as would make them responsible for the agreement in regard to this rebate, and for the consequences that might flow from it, and that the transaction is contrary to the public policy of the state of Ohio. We are satisfied also under the arrangement that was made between these parties that Tillinghast Brothers were not and could not be under the arrangement the bona fide purchasers of that paper; that the paper was taken under such an arrangement that the taking of it was the taking for the Tillinghasts: they were entitled to the paper, but at the same time Howard became an endorser upon the paper, to a certain extent—perhaps guarantor of the payment of the same.

As against the authorities which were cited by plaintiffs in error upon the question of agency, we call attention to the case *Life Insurance Company v. Sherman, et al., Executors, etc.*, 30 Ohio St., 647. We think that case very clearly lays down the law as it exists in the state of Ohio, and is perhaps directly opposed to some of the decisions that were cited by plaintiffs in error, but is of course the law binding upon this court, and we think it sustains the



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propositions that Tillinghast Brothers were responsible for the acts of Howard in procuring this insurance.

The section of the statutes referred to on page 220, of volume 86, O. L., provides in substance that:

“Such company or agent shall not pay, or allow or offer to pay, or allow, as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, any valuable consideration or inducement whatever not specified in the policy contract of insurance. Every corporation, or officer or agent thereof, who shall willfully violate any of the provisions of this act, shall be fined in any sum not exceeding \$500, to be recovered by action in the name of the state, and on collection paid into the county treasury for the benefit of the common school fund.”

It will be observed that the statute does not declare that the policy itself shall be void. But in this case we are dealing with an action that is brought by the agent of the society upon a note given, or what is equivalent thereto, a check for the note, for the premium of the first year upon the policy, upon which there had been allowed, as the jury found, a rebate of \$74.00 contrary to this statute.

The statute clearly indicates what the policy of the state of Ohio is in regard to this matter; and it seems to be clear that this note and check had been given under an arrangement contrary to the public policy of the state of Ohio, as the jury have found, and we think, under these circumstances, that the note and the policy under it became void in the hands of the Tillinghasts, and that the jury might well have so found. I may as well say in this connection that upon the facts of the case the jury were fully warranted in finding for the defendant.

Exceptions were taken to the charge of the court as given, and also to its giving of certain charges that were requested by the defendant. I think it is unnecessary to read this charge or to read these various requests: it is sufficient to

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say that they are in line with the decision of the supreme court of the state which we have already cited, and in line with the view that this court takes of the statute which has already been referred to, and that the court in giving these requests stated the law substantially correctly.

Exceptions were taken to the action of the court in ruling out certain questions to a witness, being the deposition of Moses R. Howard. We have examined those. We think the court did not err in its action in regard to those questions. They are not of sufficient importance to justify going over them and discussing them at length, but sufficient to say we have no doubt of the correctness of the action of the court in striking them out.

The judgment of the court will be affirmed.

C. F. Watts, for Plaintiffs in Error.

I. N. Huntsberger, for Defendant in Error.

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(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1899.)

Before Shearer, Summers and Wilson, JJ.

(Sitting in First Circuit.)

DAVID J. HAUSS v. GEORGE KOEHLER.

*Verdict dual in form, for plaintiff and for defendant on counter-claim admissible—*

A verdict for both the plaintiff and the defendant is not inconsistent, if dual in form, and the separate findings are on the causes of action severally pleaded by them respectively.

WILSON, J.

The petition in this case states a cause of action against the defendant upon two counts, one upon contract, and the other upon a quantum meruit, for the same services.

The answer is a general denial, and a counter-claim for injuries to property by the attempt to perform the services to recover for which the plaintiff sues. The case was tried to a jury and resulted in a verdict dual in form, being a finding for the plaintiff on the cause of action stated in the petition in the sum of \$53.00, and a finding for the defendant

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on the cause of action stated in the answer and cross-petition in the sum of \$55.00.

No exception was taken to the form of the verdict. A motion for new trial was filed by the plaintiff and overruled, and thereupon the court subtracted the findings and entered judgment for the defendant in the sum of \$2.00, to all of which the plaintiff excepted and prosecutes error to reverse the judgment.

It is argued that the court had no right to make the subtraction between the verdicts in order to arrive at the amount of the judgment, and that the two verdicts were inconsistent. The case of *Baugham v. Baugham*, 114 Indiana, 73, is relied upon as authority for this contention. In that case the verdict for the plaintiff was: "We the jury find for the plaintiff, and assess his damages in the sum of eight hundred dollars", and then followed a verdict for the defendant on his counter-claim. Of course, these verdicts were inconsistent. The finding for the plaintiff generally without confining it to the cause of action stated in the petition, precluded any finding for the defendant. But in the case at bar the finding for the plaintiff is expressly confined to his cause of action; and so with the finding for the defendant. They are not, therefore, inconsistent. The conclusion of the jury upon all the issues joined is perfectly apparent, and a mere irregularity in the form of the verdict is not prejudicial. That, no doubt, would have been corrected had the attention of the court been called to it before the jury had been discharged.

Under the circumstances the court was authorized to make the subtraction and enter judgment for the difference, for the reason that the verdicts were not inconsistent. *Brainard et al. v. Lane*, 26 Ohio St., 632.

We find no error in the record. The judgment will be affirmed.

*Kelley & Hauck*, for Plaintiff in Error.

*Stephens & Lincoln*, for Defendant in Error.

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Biles & Co. v. The Looker Co.

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(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1899.)

Before Smith, Cox and Giffen, JJ

W. C. BILES & COMPANY v. THE CHARLES S. LOOKER CO.

*Stockholder's statutory liability—Debts of corporation after contract for transfer of stock but before entry of transfer—*

The statutory liability of a stockholder may be enforced as to debts of the company contracted subsequent to the making of a written contract by the stockholder for the sale of his stock but prior to the actual transfer of the stock on the books of the company.

Appeal from the Court of Common Pleas of Hamilton co.

SMITH, J. On the evidence submitted in this case, we are of the opinion that Mrs. Lucille H. Turner should, as a stockholder in the Charles S. Looker Company, be assessed on the ten and one-half shares which were held by her in such corporation, notwithstanding the fact that prior to the incurring of the debts by said insolvent corporation, to pay which it is sought in this proceeding to assess the stockholders, she had by a contract in writing sold, or contracted to sell, a part of her shares to her husband. No record or mention of this attempted sale appeared on any book of this company until after the debts in question had been incurred by said company. Then for the first time a stock book was procured by the company (October 31, 1892), and a certificate for the original ten shares subscribed by her was issued to her, and on November 4, 1892, she appears to have assigned nine of those shares to her husband, and on November 30, 1892; the original certificate was canceled, and a new certificate for nine of the shares issued to her husband as her assignee and a certificate for the other share was issued to herself.

Under the law as announced by the supreme court in 46 Ohio St., 379, and in 58 Ohio St., 294, we think that Mrs. Turner after the written assignment by her on April 1, 1892, of the nine shares of stock to her husband, remained liable as the owner thereof to an assessment under the statute for debts contracted prior to the entry of the transfer of the shares on the books of the company. If she desired to relieve herself from an assessment for the payment of debts thereafter incurred by the company, it was her duty to see that such transfer appeared on the books of the company. The assessment now sought to be made, being for the payment of the debts of the company incurred prior to the entering of the transfer on the books of the company, there must be a decree against her accordingly.

L. C. Black, for Biles & Co. C. W. Baker, contra.

# APPENDIX.



(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Jan. Term, 1899.)

Before Hale, Marvin and Caldwell, JJ.

SIMPSON L. FORD, Receiver, etc., v. ISAAC P. LAMSON et al.

L. PHILILLI v. THE AMMON-STEVENSON CO.

*Conversion of insolvent partnership into a corporation—Assets of corporation given for stock subscriptions, not payment—*

- (1). Where the members of an insolvent partnership convert their business into a corporation, turning over to the corporation all the assets of the partnership in payment for their stock subscriptions, but the corporation also assuming all the liabilities of the partnership. Held, that nothing whatever should be counted as a payment of the stock subscriptions, and the subscribers to such stock remain liable to the creditors of the corporation for their subscriptions to the stock.

*Corporation insolvent in fact, but going concern—Right to pay creditors by way of preference—*

- (2). Where a corporation which is actually insolvent, but still carrying on its business, transfers practically the whole of its assets to one of its creditors, who is not aware of the condition of the corporation and there being no collusion, such transfer will be upheld.

*Cognovit note to creditor by corporation insolvent in fact, but going concern—*

- (3). A creditor of a corporation which is still carrying on its business, although insolvent in fact, of which such creditor is not aware, may take a cognovit note from such corporation, and take judgment thereon, and his levy of an execution upon such judgment, on the assets of the corporation will be upheld.

*Insolvent corporation can not pay claims of directors by way of preference—*

- 4). An insolvent corporation with no expectation of being able to continue its business, can not rightfully secure or pay debts owing to its directors.

*Insolvent corporation—Attachment by creditor—*

- (5). An attachment and levy by a creditor on the assets of a corporation carrying on its business although in fact insolvent, will give a valid lien on the assets levied upon.

HALE, J.

These cases are here on appeal. They have been tried together, involving substantially the same transaction. I will endeavor to indicate sufficiently to enable counsel to draw the decree.

The controversy arises between the unsecured creditors of the Ammon-Stevens Company, an insolvent corporation, and certain creditors who are claiming preference.

On the first of January, 1893, the Ammon-Stevens Com-

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Ford, Receiver, etc., v. Lamson et al.

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pany was incorporated with a capital stock of \$40,000 to prosecute a wholesale millinery business in the city of Cleveland. Of this stock F. O. Ammon subscribed \$20,000; A. J. Stevens \$10,000; J. P. Lamson \$9,800; N. S. Calhoun \$100, and Mr. Jennings \$100, the latter two being given one share each in order to qualify as directors of the company.

The first issue made arises out of the claim made by creditors averring that the several subscriptions to the capital stock have not been paid; that the same are still due and should now be paid to the receiver to be distributed to the creditors of the corporation pro rata.

Prior to the organization of this corporation the first three subscribers had been prosecuting the business under a partnership agreement from the first of January, 1890, to the first of December, 1892, when, by its terms, the partnership agreement expired.

The subscription to the stock was attempted to be paid by the transfer of all the partnership assets to the corporation, the corporation assuming all the liabilities of the partnership, and the claim is that the partnership was insolvent at that time, and, in the transfer made, actually transferred nothing to the corporation:

And we find and hold that the partnership at the time of this transfer was insolvent, even after the cancellation of an indebtedness of \$26,000, due from the partnership to Mr. Lamson.

Soon after the formation of the partnership, \$10,000 of the accounts was charged off, and although the corporation did business for a period of nearly eighteen months, at the end of that time \$33,000 of the accounts, transferred to make up the \$40,000 of the assets that was claimed to exist and were transferred to the corporation in payment of the stock, were yet uncollected, and nothing has ever been realized from them. The partnership had been doing business for three years, and necessarily there must have been a considerable depreciation of the tangible property then on hand by the partnership.

And we hold that nothing whatever that should be counted as a payment of the stock subscriptions, was transferred by the partnership to the corporation.



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Some time in January or in February, 1894, Mr. Lamson sold to Mr. Ammon, who was at that time insolvent, \$5,000 of his stock—sold it as paid-up stock, and we do not think as against creditors that that should release him of his liability to pay his subscription; so that the subscribers to that stock are still liable to pay, for the benefit of the creditors, to the receiver, the subscriptions made to the stock.

The corporation continued to prosecute its business for which it was incorporated until the second of June, 1894, at which date its liabilities exceeded the value of its assets by more than \$50,000, and at least \$100,000 more than can be realized from the assets in the manner in which the concern is being closed out.

The acts of the board of directors on that date prior and subsequent thereto are made the basis of several actions by the plaintiffs and cross-petitioners.

The evidence establishes the following facts:

The business of the corporation was carried on at a loss from the start, of which the directors had knowledge; that very large purchases were made for the spring trade of 1894; that prior to April 14, 1894, the business had been conducted under the chief management of Mr. Ammon. At that last named date the board of directors resolved that checks should be issued for the payment of bills owing by the corporation, only on the approval of Mr. Calhoun, one of the directors, after which a large proportion of the receipts were paid on claims upon which Mr. Lamson was surety or in some way responsible. On this date the corporation was indebted to The Bristol National Bank of Connecticut and the Hartford Bank, in the aggregate \$31,000, upon which Mr. Lamson was surety.

The corporation was also indebted to the Union National Bank of this city in the sum of \$32,000, for which Mr. Lamson was surety, and to Caskey & Calhoun in the sum of \$13,000 upon which Mr. Lamson was not an indorser. On the second of June, 1894, the corporation, by its trustees, resolved to transfer accounts of the face value of \$55,000 to Mr. Lamson for the sum of \$45,000 for the express purpose of paying the Union National Bank and Caskey & Calhoun. Mr. Lamson had just returned from Connecticut where he had arranged with Mr. Sessions, his brother-in-law, to take up the claims of the Connecticut Banks and advance \$1,000

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for the corporation, for which he was to receive a cognovit note of the corporation due on demand. Whether the latter part of that agreement was definitely arranged between Sessions and Lamson does not definitely appear, but ultimately it took that form. The debts to the Connecticut Banks were not due at the time payment was made to the banks. The note with power of attorney to confess judgment was authorized by the directors at this meeting, was executed, and forwarded to Mr. Sessions. The arrangements authorized by this resolution were carried out; the accounts were transferred to Lamson, \$45,000 paid by him; \$32,000 was paid to the Union National Bank, and \$13,000 to Caskey & Calhoun, and these debts were cancelled.

The cognovit note was sent to Mr. Sessions who paid the two banks in Connecticut; he also sent to the corporation, the Ammon-Stevens Company, \$1,000; this note was not endorsed by Mr. Lamson; it was made on the second of June, immediately forwarded to Mr. Sessions, received by him on the fourth of June, and on the same day sent to Mr. Bourne, cashier of the Union National Bank of this city, for collection.

In this way Mr. Lamson was relieved from his endorsement or liability on \$63,000 of the company's paper, and substantially all the good accounts withdrawn from the assets of the corporation and from the reach of unsecured creditors. On the thirteenth of June, judgment was entered upon this note in the court of common pleas of Lake county, with the knowledge of at least one of the directors of the corporation; execution was issued upon that judgment, and on the fourteenth day of June, levy was made upon all tangible property of the corporation, which ended any further prosecution of the business by the corporation.

About the time the accounts were transferred to Lamson, the company, by its directors—not we think, in the usual course of business, sold merchandise to O. D. Myers and Taylor Sons & Company, of this city, aggregating about \$7,000, which was likewise used to pay debts secured by Mr. Lamson.

It is not disputed that at the time of the transaction above indicated, the liabilities of the company exceeded largely the value of the assets; that the corporation was, in fact, insolvent.

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It seems equally clear to us that the directors, at the time these acts were done, knew or should have known that the corporation was grossly insolvent.

We are of the opinion also that the action taken by the directors of this insolvent corporation practically incapacitated it from further prosecution of its business with any reasonable prospect of success, and this, too, we think the directors ought to have known. We do not think or believe that the directors, who testified that they hoped to bring the company out of its trouble and yet make it a success, had any such expectation; but we can only say that there was no reasonable basis for such hope. The corporation had been kept afloat by the aid of Mr. Lamson in making advances to the company and in endorsing its paper. When this support was withdrawn, there was no alternative but failure. The adoption of the resolution of June 2nd, and the carrying out of the transactions therein provided for, put the affairs of the corporation in such condition, that there was practically no alternative but failure.

By these essential facts of the case the rights of the parties are to be determined. First, it is claimed by the receiver, that the money paid to the Union National Bank should be refunded to him, that it may be distributed to the general creditors of the corporation pro rata.

Upon this claim we hold with the bank.

The evidence shows no collusion between the bank and directors of the corporation. It is not shown that the bank had knowledge of the situation. The company, at the time this payment was made to the bank, was in the actual possession of its property and engaged, in a way, in the prosecution of its business; nor do we think the affairs of the corporation had reached a condition when the doctrine of the *Rouse v. Bank* case, 46 Ohio St., applies.

Again, it is sought to have declared void the levy of the execution issued on the Sessions' judgment. The evidence in the case does not authorize the finding that Mr. Sessions knew of the condition of the corporation, or colluded with or aided the directors in defrauding the general creditors of the corporation, or in carrying out a purpose by the directors to prefer themselves.

If we are right in our holding as to the bank, Mr. Ses-

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sions can not be deprived of his advantage by the doctrine of the Rouse case.

Sessions actually advanced to and for the corporation at the time he received the note, the full sum for which he took the company's note. The transaction was not illegal, and he held his note by good title. While the company was in possession of its property, and apparently, so far as known to outsiders, was engaged in the prosecution of its business, we are of the opinion that a creditor might lawfully enforce his claim against the company by any remedy provided by law. We, therefore, decide this issue in favor of Mr. Sessions, not without some doubts and misgivings. Much might be said against this holding—the fact that the claim was not due; that Mr. Sessions was a brother-in-law of Mr. Lamson, and other circumstances connected with it tend quite strongly to show that there might have been some collusion between Lamson and Sessions to bring about the result that was accomplished, but we hold as I have stated.

Again, what are the rights and liabilities of Mr. Lamson?

We have found that the corporation at the time of the transfer of the accounts to him—to Mr. Lamson—was insolvent, of which fact he (Lamson) had knowledge; that the board of directors could have had no reasonable expectation of continuing for any considerable time the business of the corporation; that after the acts of June 2nd, and those immediately following, the only alternative was failure which was then eminent.

We must find also under the evidence, that one of the objects of the board was to relieve Mr. Lamson from his liability, and, if we are to hold the board to have intended the natural legitimate results of the acts done, that it was the intention of the directors to prefer him and relieve him from his liability as surety.

The authorities are not entirely uniform upon the subject of preference by an insolvent corporation of its directors.

In Connecticut and two or three other states, the courts have sustained preference to directors under circumstances similar to those found in this case; but the decided weight of the authority is against the proposition. As indicating the general tendency of the authorities, I read a sentence or

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two from the case of *Alney v. The Connecticut Land Company*, 16 R. I., 597.

"The directors of an insolvent corporation are by virtue of their position, debarred from preferring debts of the corporation due to themselves. The directors of a corporation are trustees for its stockholders. When the corporation becomes insolvent, the directors become trustees for the corporation creditors."

In the discussion of the case the reasons are briefly given for this holding.

"The vital question is, whether a director of an insolvent corporation is to be regarded as a trustee for its creditor. If he is so, the duty of a trustee to a cestui que trust is plain. For a trustee to collect his own debts, to the detriment of that of his cestui, is a clear breach of fidelity. When one accepts the trust of caring for another's interest, he accepts the attendant duty. It must be admitted that directors of a corporation are not technical trustees. They do not have in themselves the title to property which they hold for the benefit of others; and certainly, as to creditors, they are under no express trust. The corporation is a legal being, distinct from its officers and stockholders. It may deal with them as individuals and may owe them debts. It holds its own property, and has the capacity and responsibility of acting for itself. Nevertheless, the conduct of its affairs must, of necessity, be entrusted to officers in whom confidence is reposed, to whom large powers are given, and by whom its property is managed for the common benefit.

"As corporations have multiplied and have become so greatly concerned in business affairs in recent years, the obligations arising from such a relation have become correspondingly prominent.

"While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that, when the corporation becomes insolvent and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go."

Denying a preference that was made to the trustees.

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Ford, Receiver, etc., v. Lamson et al.

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Now, in this state, of course, the trust doctrine is carried to its furthest extent, and goes quite as far as it is carried in any other state.

We hold, then, that an insolvent corporation with no expectation of continuing its business, can not rightfully secure or pay debts to its directors, nor debts upon which such directors are collaterally liable, and thus relieve such director from his collateral liability. These accounts were not sold to Mr. Lamson, in the usual course of business. He took the accounts under the stipulation that the money paid by him should be applied in payment, or a large proportion of it, upon debts upon which he was collaterally liable. He was under obligation before this transaction, to pay the debts which were actually paid, and the transaction is not different from what it would have been, had he paid the debts and withdrawn from the corporation assets, accounts sufficient to indemnify himself for the payment thus made. In this state at least, directors occupy a position of trust towards the creditors of an insolvent corporation, and can not, under the circumstances of this case, violate that trust by transferring the assets of the corporation to themselves, either in payments of debts due to themselves, or to relieve themselves from collateral liability. The relation which directors bear to the corporation as trustees of its assets, is such that they can not rightfully prefer debts due to themselves from the corporation, or prefer debts in the payment of which they have a personal interest. The rule forbids, not only preference by directors of their own debts, but also of all debts in which they are interested and from which they could reap a personal advantage by the preference. It follows, then, that the accounts were wrongfully transferred to Mr. Lamson, and that he must account to the receiver for the proceeds realized by them, and that the money now held by the bank should be paid over to the receiver to be distributed pro rata among the creditors.

As to Caskey & Calhoun, the logic of what we have said would require either that they refund the \$13,000 received, or require Mr. Lamson to account for the entire accounts transferred to him. And, as we hold, the withdrawal of these accounts from the assets of the corporation was wrongfully done, with the knowledge of Mr. Lamson and Mr.

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Calhoun. Those accounts—those assets may be accounted for entirely by Mr. Lamson, and the controversy between him and Caskey & Calhoun settled between them. If the general creditors—the unsecured creditors, get advantage of all the assets which the corporation had, they get all they are entitled to, and they get that by having the benefit of all those accounts.

Now, disconnected with this transaction is the claim of Menke against this corporation. He commenced an attachment proceeding, and levied upon the book accounts of the corporation. The levy of this attachment was made on the 13th of June. On the 14th a receiver was appointed of this corporation, Mr. Ford, in the second case that I named. The question here arises between this attaching creditor and the general creditors. He claims a preference by virtue of his attachment, and it is insisted by the receiver that he gets no such preference.

The majority of the Court hold that by the levy of the attachment on the 13th on the book accounts, the attaching creditor obtained a lien; that the provisions of the statute relating to the appointment of a receiver to collect those accounts and apply them to the debt of the attaching creditor, are provisions of the statute enacted for the purpose of enabling the attaching creditor to realize the benefits of the attachment; and, inasmuch as a receiver was appointed on the day following the levy of this attachment, who was ordered to take possession of all the books, accounts and property of the insolvent corporation, that it would have been a useless thing to appoint a receiver at the instance of the attaching creditor to work out his rights under a levy; that all of that could properly be done under the receiver who was appointed for the benefit of the general creditors.

One of my associates, Judge Caldwell, is very sure that we are wrong in this proposition, and very likely we are, but that is what we hold.

Mr. Caskey: You have not passed upon the major point—upon the value of the property levied on the cognovit note, and the liability. You said Sessions was not chargeable, but you did not say anything as to Lamson.

Judge Hale: There, again, a majority of the court do not think that Mr. Lamson ought to be held upon that levy;



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in other words, we allow Mr. Sessions the benefit of his levy, and do not require Mr. Lamson to make good to his creditors the amount of property withdrawn by that levy.

Judge Marvin: I can not understand how Mr. Lamson is to be excused from liability therein

*Gilbert & Hills, for Plaintiffs.*

*Caskey & Calhoun, A. A. Stearns, for Defendants.*

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(Sixth Circuit—Lucas Co., O., Circuit Court—Nov. Term, 1894.)

Before Bentley, Haynes and Scribner, JJ.

EDWARD F. and ELIZABETH MEEKER v. OTIS and C. A. BROWNING.

*Evidence—Rules as to testimony in rebuttal—*

- (1.) The same rules apply to testimony in rebuttal as to testimony in chief.

*Exception to court's ruling out testimony—How exception to be saved—*

- (2.) Where it is attempted to prove custom, and on objection the testimony is ruled out, to save the exception the party offering such testimony should state to the court what it is proposed and expected to prove by the witness.

*Gas and oil lease—Location money—*

- (3.) Agreement set out construed as amounting to a release of location money.

*Error in charge—Exception—*

- (4.) Where the charge of the court on a certain point is assigned as error, to bring the question before the reviewing court, the court should be requested to charge upon that point, and if considered erroneous, to formulate a charge such as the party excepting considers to be correct.

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BENTLEY, J.

This is a petition in error brought by Edward F. Meeker and Elizabeth Meeker, who were plaintiffs below, to reverse a judgment of the court of common pleas in an action brought by them. The amount of the verdict below was \$45.51 in favor of the plaintiffs, but that was very much less than what was claimed by them in their petition, and so they seek to reverse the judgment in order that a new trial may be had of the case. Several errors are assigned; some of them in the admission of testimony; some as to the construction placed by the court upon certain written instruments which were offered in evidence, and objections and exceptions also taken to the charge of the court, and exception to its failure to charge certain propositions. The action arises up-



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on a transaction had upon what is ordinarily called an "oil and gas lease", which was granted by the plaintiff to all the defendants on the 21st day of April, 1890, by the terms of which the defendants Browning were to drill certain wells for oil or gas upon the premises of the plaintiffs, and in case oil was obtained they were to give to the plaintiffs one-sixth of all the oil or mineral produced and saved from said premises and to deliver the same in tanks or pipe lines to the order of the parties of the first part, viz.: the plaintiffs. The lease provides for the sinking of three wells within certain times named in the lease, and contains this stipulation: "And to pay \$100.00 each for the second and third well after commencing the same." On the margin is the following "Should any additional well be drilled on said premises other than here stated, said second party agrees to pay \$100.00 for each additional location." The party of the second part, the defendants in this case, drilled five wells upon these premises. For the first, no location money was provided; but it is claimed by the plaintiffs that for each of the other four, \$100 location money was due and is due to them, and has never been paid. The plaintiffs also claim that in the operations carried on by the defendants under this contract, they took and converted to their own use a large quantity of crude oil which belonged to plaintiffs and which the defendants used for fuel purposes in their operations under the lease, as the plaintiffs claim to the amount and value of \$400.00, and their action was for \$400.00 location money and interest on these various sums from the time the wells were commenced, and also in a special action sounding in tort for \$400.00 for the conversion of this oil.

The answer denies, in substance, that this location money was due or payable, and sets up that on the thirteenth of February, 1891, there was a written contract entered into between the parties by which this location money was all released. They deny the allegation regarding the conversion of the oil also, and claim other defenses in this respect. They say they did use a small quantity of crude oil for fuel, not exceeding 800 barrels in all, but they say that plaintiffs expressly granted to them the use of it and agreed that no charge should be made for it; then they further set up a usage and custom by which those operating for oil are allowed sufficient gas and oil from the lease for fuel purposes while operating under the lease, and that without charge. They further set up that they had a special agreement to pay plaintiffs for fuel oil used in operating wells on other leases, but that they settled with them for that and paid them

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\$15.00, and that was received in full settlement and satisfaction for any oil used by defendants.

The defendants then set up this further matter, viz: "That at a certain time, when some of these wells were producing gas, the plaintiffs surreptitiously connected their house and premises with defendant's pipe line, through which defendants had been receiving gas in sufficient quantities to supply fuel for operating said lease from a gas and oil well on said premises, which gas the defendants had a right to use for their own purposes for fuel, and deflected from the pipes of the defendants so much gas which otherwise would have been furnished them for fuel that it became necessary for them to provide other fuel; and they claim they were damaged for that reason in the sum of \$2000.00, for which they ask judgment. In the reply to that answer plaintiffs say, that by agreement of February 18, 1898, it is provided that if defendants should drill the third well provided for in said lease, and three additional wells within one year from the time fixed for the completion of said third well, that said defendants should not be required to pay said location money. But plaintiffs say that said defendants did not drill said wells as required by said agreement of February 18, 1898. And plaintiffs deny each and every allegation of new matter in the answer contained that is not herein expressly admitted.

On those issues the case proceeded to trial before a jury, evidence being given by both parties.

In the course of the trial an exception was taken on page 70 of the record which has been called to our attention; an exception to the ruling of the court as to the admission of certain evidence offered by the plaintiffs in rebuttal. The plaintiffs in rebuttal called one Daniel Mercer, and the question was put to him: "You live in Bowling Green?" A. "Yes, sir."

Q. "Are you acquainted with the custom in this county where a lease is operated, as to whether oil used for pumping purposes etc.,—do you know what the custom is as to whether the fuel oil is paid for by the operators?" A. "I don't know all the custom, I know a part of it."

Q. Do you know what the custom is in this field among operators?" A. I know what the custom is with those who work with us."

Q. What is that custom?" Defendants objected to question; objection sustained and exception taken. Thereupon the plaintiffs rested their case. Now, whatever might be

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said as to the propriety of that question, considering the record as it was made prior to that time, it will be seen that the plaintiffs did not take the requisite steps to preserve the error which is there claimed. While this is in rebuttal, the same rules apply as in testimony in chief. There should have been a statement of what the parties expected and desired to prove by the witness, and in the absence of anything of that kind, the rule is that the court will not regard it as prejudicial what that custom offered to be shown was or was not. Of course, it may naturally be supposed that the plaintiffs would seek to rebut certain evidence that had been given by the defendants, but we think the rule as we have stated applies notwithstanding that the defendants had offered testimony as to such a custom as they claim.

After the close of the testimony, this action was taken by the court as appears by the record: "Now, the view that the court takes of this case, the only question that is to be submitted to you, is the value of certain oil that it is said was used in drilling the wells. Under the evidence the plaintiffs will be entitled to recover for the fuel oil used by defendants in drilling these wells, so many as you find were drilled, and entitled to recover whatever you find is the fair value of the fuel oil, and it is for the plaintiffs to satisfy you by a fair preponderance of the evidence as to how many wells were drilled, and as to how much oil has not been paid for, and the value of the oil"

At the close of the charge, this exception was noted: "To said charge of the court, and especially to the failure of the court to submit to the jury the question whether the plaintiffs were entitled to recover for the oil used for fuel in pumping oil; and failing to charge that plaintiffs were entitled to recovery for such fuel oil"

It is manifest from the record that the principal amount which the plaintiffs in this action would hope to recover, was for this location money. It is much the larger amount, and this action of the court in construing this subsequent paper of February 18, 1891, presents perhaps the most important question which has been argued before us.

I will read the alleged release of the location money:

"Mungen, Ohio, Feb. 18, 1891.

"Agreement between Elizabeth Meeker, Edward F. Meeker and O. A. Browning and C. A. Browning. In consideration that Elizabeth Meeker and Edward F. Meeker have and do relinquish all location money stipulated in a certain lease

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made between the parties hereto on April 21, 1890. We, O. A. Browning and C. A. Browning, agree to drill three additional wells within one year from the completion of the third well mentioned in said lease.

(Signed in duplicate,)

"ELIZABETH MEEKER,  
"EDWARD F. MEEKER,  
"C. A. BROWNING."

The court construed that as an absolute release of this location money. The plaintiffs here claim that in order to construe as a release the action here provided for to be taken on the part of the Brownings it must in fact have been taken, and that those three additional wells must have been drilled and drilled within the time provided for in this paper; that otherwise, it was in effect a mere offer to release, and never took effect as a release until such work was in fact done and the wells drilled. But we think it is clear and manifest that that was not the proper view to be taken of this paper. The reply sets up that the paper was an agreement to release in case these additional wells were in fact drilled, but the paper provides that now, at the time of the execution and delivery of this paper, the plaintiffs have agreed and do relinquish all location money stipulated, and the Brownings agree to drill three additional wells within one year.

It would seem that an absolute release was made by the plaintiffs upon the agreement of these parties to drill these additional wells. This was a new contract, founded upon a sufficient consideration, and if it was not complied with or released in any way, any action of the injured party must be had upon this contract; and the construction placed upon that by the court we think is manifestly just and proper.

The other aspects of the case present a little more difficult question. It will be seen that the court allowed the jury to pass upon the evidence relating to the use of fuel oil for drilling these wells, and did not submit to the jury the question as to fuel oil used in the pumping of the wells and steaming of the oil after it was produced.

It is said that the court construed the clause in the original lease providing for the delivery of one-sixth of the oil produced and saved, as excluding the idea of delivering any such oil except such as was, in fact, finally run into the pipe lines, or which ought to have been run into the tanks or pipe lines in the ordinary way of operating for oil. We think the construction given by the court in that particular is at least of doubtful propriety, but the parties, when the court

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took the position that it did, did not request any charge to be given in this respect; did not formulate any request of their own, and did not in any way ask the court to charge upon that subject; and besides that, in looking over the proof, we find an unequivocal statement on the part of one of the witnesses as to the amount of oil which was used in all, which he says did not in any event exceed three hundred barrels.

This includes not only all the oil that was used in drilling, but the oil that may have been used for other purposes. The testimony on the part of the plaintiffs as to how much oil was used for steaming or pumping the oil is exceedingly vague and indefinite, no one seems to know exactly how much there was of it. The plaintiffs say more or less of it was used all the time.

But taking the testimony as it was presented, and the verdict of the jury, and it seems to us that it can hardly be figured from the record that the plaintiffs were prejudiced or injured by this action of the court and the verdict of \$45.51. The price of oil at various times is given, but how much oil was used during the time oil was sold at fifteen cents per barrel, or how much when it sold for thirty cents, thirty-five cents, or thirty-seven and one-half cents, does not appear, and it seems to us that the plaintiffs can only recover as the court charged the jury: for one-sixth of the gross amount used, and that there has been no substantial injury or prejudice resulting from this action of the court. In view of the whole record upon this subject as to the oil used for operating the well and steaming the oil, we do not feel warranted in disturbing the verdict of the jury; and, finally, we think the judgment of the court below against the plaintiffs in error in what we regard as the main matter, should be affirmed.

*Parker & Moore*, for Plaintiff.

*Baldwin & Harrington*, for Defendant.

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The C. H. & D. Ry. Co. v. Curtis.

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(Sixth Circuit—Lucas Co., O., Circuit Court—October Term, 1894.)

Before Bentley, Haynes and Scribner, JJ.

C. H. & D. R. R. CO. v. FRANK M. CURTIS.

*Railroad—Injury to car coupler—Defect in drawbar of car—Attempt to remedy defect—*

(1.) In action by an employe of a railroad for damages for an injury, suffered while coupling cars, caused, it is alleged, in consequence of the company knowingly furnishing to him for coupling a defective car, the drawbar of which was seven inches lower than it ought to have been, and that in attempting to couple another car to this one, in the night, he was caught between portions of the two cars and his hand was crushed, it appeared that plaintiff in attempting to remedy this defect in the drawbar, placed a block under the strap, for the purpose of holding the drawbar up; but that the block fell out and allowed the drawbar so to act as to catch his hand in the link. Held, that the defect in the car coupling must be the proximate cause of the injury to entitle the plaintiff to recover. But the jury might take into consideration, that the cars were pretty near together when he went in to make the coupling and when he first noticed the condition; that his action was very rapid; that it was in the night, and he thought, that he might block up the drawbar so he could couple the cars. That he attempted to do it and failed, there being but little time, and all facts and circumstances under which the plaintiff below was acting in that regard, and that the jury was to judge whether under these circumstances the injury was to be attributed to the defect in the car, or to his own attempt to remedy the defect.

*Error for insufficiency of evidence to sustain judgment—Bill of exceptions must state all the evidence—*

(2). Where one of the errors assigned is that the verdict was not sustained by sufficient evidence, and it is recited in the bill of exceptions: "This was all the testimony offered in behalf of the plaintiff, which tended to show the manner in which said injury was received, and the cause for the same," also: "All other testimony offered in behalf of plaintiff related solely to the character and extent of plaintiff's injury;" such bill of exceptions is not sufficient to authorize a reviewing court to reverse the judgment below on the ground that it is not sustained by the evidence.

*Error to the Court of Common Pleas of Lucas county.*

BENTLEY, J.

In this case the defendant, Curtis, recovered a judgment in the common pleas, against the plaintiff in error, for the sum of two thousand dollars for injuries alleged to have occurred to him while in the employ of said railroad company, as a switchman in the yards, having had his hand crushed and losing certain of his fingers. The accident is said to have occurred in 1886, at four o'clock in the morning, while it was dark and while he was attempting to couple two freight cars. He alleges that the company, defendant below, wa

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negligent, and by reason of the negligence of the company, he received this injury, for that the company furnished to him for coupling a defective car, a car the drawbar of which was seven inches lower than it ought to have been, and that in attempting to couple another car to this one, in the night, he was caught between portions of the two cars and his hand was crushed in the manner stated. He says that this car was known to be defective—to the company—prior to the injury, and that they negligently still furnished it to him for use in coupling.

There are two things that are relied upon as exhibiting error of the court below, two principal things, and one is, that the court erred in modifying a certain charge that had been requested by the railroad company; and the other, that the evidence did not sustain the verdict, and the court erred in overruling the motion of the railroad company for a new trial, for that reason.

In its charge to the jury the court gave all of the requests which were preferred by the railroad company. They number nine, although the last two are each numbered "eight". The exception to the act of the court in this record is: "The defendant through its counsel here excepted to the court's modification of defendant's last request."

The last of that series of requests, as presented in the first instance, was this:

"8. That, if the plaintiff was chargeable with the omission of such duty he cannot recover in this action, if such omission of duty contributed to his injury.

The court says in its charge to the jury, after giving all the requests preceding, that: "If the plaintiff was chargeable with the omission of such duty, he cannot recover in this action if such omission of duty contributed to his injury." This is the exact language of the request, and the court does not in that place proceed to modify it, so far, at all. It may, however, be that the exception related to the request preferred by the attorney of the railroad company after the court had delivered its charge for the most part.

The court says: "You may retire and select one of your members foreman."

"Your Honor—One thing occurs to me; if Curtis, in attempting to remedy this supposed defect in the drawbar, placed a block under the strap, for the purpose of holding the drawbar up; and, if by reason of the improper manner, in which that drawbar was placed there, it fell out and al-



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lowed the drawbar so to act as to catch his hand in the link, that that should be considered the proximate cause of the injury, and the cause, on account of which he would not be entitled to recover from the company."

It would seem thus far, that that was the verbal statement of the counsel; but it was followed further by this statement: "And the defendant asks your Honor to further charge: 'That, if the jury should find that the falling of the block from under the strap, or drawbar, was the cause of the injury, that that divests him of his remedy.'"

Possibly that may have been presented to the court in writing. It was stated by the plaintiff below, that, finding this drawbar too low, he had attempted to put this block in there, and it fell out in some way, and the injury happened to him notwithstanding. The court being requested in that way to give that to the jury, replied as follows: "We say to the jury that the injury must have arisen from the defect proven, if any was proven to have existed in the car that was coming down the track; and it must not arise from anything else. The proximate cause of the injury must be the defect in the car-coupling." Then the court proceeded to illustrate, and says, at the close of his illustration, "Is that as I understand you?"—speaking apparently to counsel.

"I don't think you do. Suppose the drawbar was low, and that it would not have been a prudent thing for him to attempt to make the coupling with it in that condition; if he attempted to make it more safe by putting this block under there, and, in consequence of its not having been put there in a sufficiently proper manner, it fell out, and, because it fell out, he was injured—that that would all be at his risk, and not at the risk of the company."

Then the court said: "Well, we say to the jury that the injury must have been caused by the defect. If it was not caused by the defect alleged in the petition and attempted to be set out in the evidence—why, the plaintiff has no cause of action. If it was caused by the peculiar and careless manner in which the plaintiff handled it, and the injury was the result of an accident independent of this defect, then there would be no negligence imputable to the railroad company for an injury arising from a defect.

Treating this exception as aimed at this action of the court, we are inclined to think that the proper proposition which arises in the case and upon the testimony, was given by the court, although perhaps not in the language presented to the court by the counsel. We think that "If the jury should find that the falling of the block from under the



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strap, or drawbar, was the cause of the injury, that that divests him of his remedy," would be a severe statement, standing alone. The proof shows that the cars were pretty near together when he went in to make the coupling and when he first noticed the condition; that his action was very rapid—it was in the night—and he thought, perhaps, incidentally, that he might block up the drawbar so he could couple the cars. He attempted to do it and failed to do it, there being but little time; we are inclined to think that the jury might have taken into consideration the facts and circumstances under which the plaintiff below was acting in that regard, and that they were to judge after all whether these caused the injury, or whether it was caused by the defect. In general, we find against the plaintiff in error upon that assignment of error.

The principal question in the case, however, arises upon this other claim: That the verdict was not sustained by sufficient evidence, and it brings that into view for discussion.

At the close of the testimony for the plaintiff below, it is recited in the bill of exceptions: "This was all the testimony offered in behalf of the plaintiff, which tended to show the manner in which said injury was received, and the cause for the same." (Record, p. 25.) Also: "All other testimony offered in behalf of plaintiff related solely to the character and extent of plaintiff's injury." *Ib.* Thereupon the attorney for the railroad company moved the court to arrest the testimony in the case from the jury and instruct them to return a verdict for the defendant. That motion was overruled and excepted to; and thereupon, without hearing any testimony at all upon the part of the defendant, there being none offered, as is shown by the bill of exceptions, the case proceeded to the jury upon the testimony offered by the plaintiff. It will be seen by the bill of exceptions that all of the testimony given to the jury is not preserved in the bill of exceptions, but the statement of the judge is, in the bill, that all other testimony offered in behalf of the plaintiff—that is, except that set out in the bill of exceptions—related solely to the character and extent of plaintiff's injuries. So, the question presented to us is—whether, in a case where it thus appears that all of the testimony in the case is not before us, we will still consider the question of the court's having erred in overruling a motion for a new trial, on the ground that the verdict was not sustained by the evidence, and whether the court erred in overruling the motion to arrest the testimony from the jury. These two questions are presented.

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The only case that was cited to us by defendant in error upon this point was Reid v. Sycks, 27 Ohio St., 285, 287. The statement of the judge who delivered the opinion in that regard, is not found in the syllabus of the case, but in the first paragraph of the decision, which is this:

“Johnson, J.: The bill of exceptions does not purport to contain all the evidence. John P. Reed’s evidence on certain points only is set out, and it is stated that ‘this was all the evidence on those points.’ ‘And thereupon, after other testimony was given on other points not mentioned herein,’ the jury brought in a verdict, etc. In this state of case it is well settled we cannot review the findings upon the evidence.”

We are not inclined to think, however, that this authority necessarily settles the question arising in this case. In this case the bill simply preserves the evidence of certain witnesses on certain points, but it does not appear but that other points material to the case below—the evidence upon other points—was not preserved, so that we are unable to say whether those points spoken of here were the only material points which the jury might consider in deciding this case. That hardly meets the case in all points here.

There are many decisions which bear, in general terms, upon this point; for instance in Wagers v. Dickey, 17 Ohio, 439, is the general statement, being as follows:

“The bill of exceptions does not profess to give all the evidence covered by the plaintiffs in support of the action prior to the motion for a non-suit. We are left altogether in the dark upon that subject, and if any supposable state of proof connected with what is shown by the first bill of exceptions would have sustained a right of action, we ought to presume such proof to have been given, until the contrary appears.” And that was a motion to non-suit.

And again, following that, in Wilson v. State, 2 Ohio St., 819, 821: “We are asked to reverse the judgment, upon the ground that the court of common pleas erred in overruling the motion for a new trial; and it is claimed that the verdict is ‘contrary to the evidence’, and ‘against the weight of evidence.’ Whatever the fact may be, the record does not sustain this proposition. The bill of exceptions does not purport to set out all that was proved. In fact, it informs us that other things than those set out were proved, and, as it cannot be presumed that the court below committed error, we are left to infer that the evidence sustained the verdict.

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The cases of *Wagers v. Dickey*, 17 Ohio, 439, and *Hicks v. Person*, 19 Ohio, 447, are regarded as decisive on this point."

But while that bears in general terms upon the main proposition, it is not perhaps necessarily directly applicable to the question here. Neither is the case in *Cantwell v. State*, 18 Ohio St., 477, 480. The court, however, say, in that case: "As to the third ground upon which a new trial was sought, so far as it relates to the insufficiency of the evidence to sustain the verdict, it is only necessary to say that we cannot review the action of the court below, for the record does not affirmatively show that all the evidence given to the jury was embodied in the bill of exceptions.

"The rule on this subject has been so often stated in the reported decisions of this court that it need not be again repeated here."

But it does not appear that the precise question which arises in this case was really before the court in that case.

In the case of *Ide v. Churchill*, 14 Ohio St., 372, 378, we find this statement: "From the very nature of this exception, the bill of exceptions must bring before the reviewing court all the evidence acted upon in the court below, and upon which its ruling was founded; and as nothing but the record can be regarded, it is a matter of course that the bill of exceptions must show upon its face, either expressly or by necessary implication, that it contains the whole."

In *Hicks v. Person*, 19 Ohio, 426, the court use this language on page 446: "Before this court can determine whether a verdict in the court of common pleas is 'against evidence,' we must have, not a part only, but the whole evidence which was before the jury, on the trial, and this must be brought before us by a bill of exceptions, made part of the record." And, in the syllabus, it says: "It must be embodied in the bill of exceptions, or in some manner so made a part of it, that there can be no doubt that the supreme court has precisely the same evidence before it that was before the jury." But, in this case it appeared that there was a great portion of it omitted from the bill of exceptions which might well appear to have been exceedingly valuable as bearing upon the main features of the case.

But in *Eastman v. Wight*, 4 Ohio St., 157, is a case which we think more nearly applies to the matter in hand. In this case it is said: "The bill of exceptions does not state that all the evidence given at the trial is set forth, the language of the bill being that the witnesses 'testified in substance' as therein set forth—and in one instance, that a witness, being recalled, 'made some explanations and testified

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in substance as follows.''' It appeared that the testimony was preserved except that infirmity—a statement of the judge who signed the bill of exceptions that the testimony of the witnesses was preserved “in substance” in the bill, and the court in a case of that kind, with that sort of a statement in the bill, says this—the opinion being pronounced by Judge Rauney: “To enable this court to review the judgment of the court below, overruling a motion for a new trial, because the verdict is claimed to be against the evidence, it must appear, either expressly or by necessary implication, that the bill of exceptions contains all the evidence given to the jury upon the trial. This has been the constant course of decision, and is affirmed in several reported cases. *Kepner, Adm'r. v. Sniveley, Adm'r.*, 19 Ohio, 296; *Walker v. Lessee of Devlin*, 2 Ohio St., 593.

“Indeed, the very nature of the inquiry demonstrates the absolute necessity of the rule. No question of law is involved, but it is simply an appeal from the jury on the facts; and without having the evidence given to the jury, it is impossible for us to say whether it justified their finding or not.”

There was a statement analogous in some respects, we will say, to the statements in this bill of exceptions.

But *Railway Co. v. Probst*, 80 Ohio St., 104, is yet more in point, perhaps. The only difficulty with the bill of exceptions in that case, as not embodying all of the testimony, was this, reading from page 107:

“The record shows that the whole of A. Harris’ deposition was offered in evidence to the jury, and that the substance only of that deposition is carried into the bill of exceptions. The jury had the whole of Harris’ deposition to consider and weigh in making up the verdict. We are asked to declare the verdict not supported by the evidence in the case, when we are furnished with but the substance of a portion of the testimony. This is not enough. The reviewing court, in such case, must have all the testimony that was produced and used on the trial before the jury set out in the bill of exceptions. The substance only of any part of the testimony used in the trial will not meet the requirement of the rule.

“This doctrine, on the question of reviewing the action of the lower courts on overruling motions for new trials, early found favor in Ohio. In the case of *Hicks v. Person*, 19 Ohio St., 426, it was held: “It must be embodied in the bill of exceptions, or in some manner so made part of it, that there can be no doubt that the supreme court has precisely the

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same evidence before it which was before the jury."

"This rule is supported by such a solid rank of the authorities in this state that we are not authorized to depart in any respect from it."

Now, the statement of his bill is: "As other testimony offered in behalf of plaintiff related solely to the character and extent of plaintiff's injury." That was the opinion of the judge who signed the bill of exceptions and those who prepared the bill for his signature; the statement as to the character of the other testimony, but it indicates that there was other testimony which was not preserved, and from the authority of *Eastman v. Wight*, 4 Ohio St., 157, and *Railway Co. v. Prebst*, 30 Ohio St., 104, where the judge had made the statement, it would seem to us, from that alone, that the proposition is strong and analogous to the present case, and decisive of it. Peradventure the reviewing court may have had the same opinion in regard to the balance of the testimony that the jury may have had. The jury may have thought that that testimony omitted by the bill, which the court say bore upon other points, in fact bore upon the principal question, and this court if it were before us, might come to the same conclusion. We think that the rule under the authorities is so absolute, in Ohio, that we are not permitted in this state of the record to reverse the judgment for this reason, although it is of no moment what the court think of the strength of the plaintiff's case, if we had all the testimony before us.

There is one authority, in 28 Ohio St., which was cited to the court.

*Whelan's Ex'r. v. Kinsley's Adm'r.*, 26 Ohio St., 131, was cited as indicating that the rule here furnished is not necessarily a guide.

We think that the court was not considering the question that is raised in this case. There, the court found that the pleadings entitled the plaintiff to recover, and having certain testimony before it and not finding in that testimony anything conflicting with the plaintiff's position, but so far as it went, tending to support it, the court found that there was no error in the action of the court below. We consider that that does not make an invasion of the rule.

*Woolley v. Staley. Treas.*, 39 Ohio St., 354, was also cited. The last clause of the syllabus is: "3. Where a bill of exceptions discloses all of the evidence offered on the trial, and this court, upon examination thereof, finds that all the facts which such evidence in any degree tends to prove will not sustain the judgment, it must be reversed."

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Toledo Consolidated Street Railway Company v. Fuller et al.

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The supreme court in this case was considering whether or not, in view of the law that did not require them to judge of the weight of the testimony, they could reverse a case where there was no testimony to support the verdict, absolutely no testimony, and it was a case where all the testimony was preserved by the bill of exceptions; so we are unable to say that that would dispose of the question here, and we think the judgment must be affirmed, for the reasons stated. No penalty will be adjudged.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1894.)

Before Bentley, Haynes and Scribner, JJ.

THE TOLEDO CONSOLIDATED STREET RAILWAY COMPANY v. FULLER et al.

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*Street Railroad—Passenger riding beyond his destination—*

- (1). Where a passenger on a street railroad car is carried beyond her destination in consequence of the failure of the conductor to notice her signal to stop, she still remains a passenger, and entitled to the care owing by the street railroad company to its passengers.

*Collision of street car with locomotive at crossing—Presumption of negligence—*

- (2). Under the rule laid down by the supreme court in *Iron R. R. Co. v. Mowery*, 36 Ohio St., 418, a charge by the court in an action for damages received by passenger of a street railroad car in consequence of a collision of the car with a locomotive at a railroad crossing, that the fact of the injury under the circumstances stated put the railroad company prima facie in the wrong and devolved upon it the burden to show that the injury was the result of an accident, and that it could not have been prevented by the exercise of that reasonable care and skill which prudent men are accustomed to employ under similar circumstances is correct.

*Act of May 4, 1888—Car and horses considered as one—*

- (3). Under the act of May 4, 1891, 88 O. L., 581, requiring street cars to stop at railroad crossings and send a man ahead to see that the tracks are clear, the car and the horses attached to it are to be considered as one in calculating the distance from the railroad track at which the street car is required to stop by the statute.

*Injury by negligence of Street car employes and Railroad employes—Both liable—*

- (4). Where the employes on a street car fail to stop the car at a railroad crossing as required and within the distance from the railroad tracks provided by the act of May 4, 1891, and the gatekeeper of the gates provided at such crossing also fails to lower the gates to prevent the car from crossing, and a collision occurs in consequence thereof in which a passenger is injured, both the street R. R. Co. and the Railroad Co. are liable for damages
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Error to the Court of Common Pleas of Lucas county.



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Toledo Consolidated Street Railway Company v. Fuller et al.

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HAYNES, J.

This is a petition in error filed for the purpose of reversing the judgment of the court of common pleas, in a case wherein Mrs. Fuller was plaintiff and the plaintiffs in error were defendants. The grounds of error are the usual ones, and they are set out in various forms, and need not be here stated.

It will be necessary to state this case very briefly, and I will endeavor to do it. Suffice it to say that Mrs. Fuller sets out in her petition that on January 9, 1892, she took passage upon the street railroad cars on Monroe street, to ride along the line of said street railway on Monroe street, to a point near Smead avenue, near which she resided. She sets out that as she arrived near that point she signaled to the conductor to stop the car to allow her to get out, but for some reason the car was not stopped, but proceeded on down to where the street railroad crosses the line of the Lake Shore road, which at that point is used by the Michigan Central Company also, under some arrangement with the Lake Shore Company. She claims that at this point there should have been lowered a gate, which was placed by the railroad company in position to be lowered across the street on the approach of a train; that at that time there was approaching this crossing a train along the tracks of the Lake Shore road, which train was owned and controlled and operated by the Michigan Central Railway Co.; that owing to the negligence of the gateman at the crossing, who was in the employ of the Lake Shore & Michigan Southern Railway Company, the gates were not dropped at the time they should have been. She claims further that as the car approached the railroad crossing, which car was drawn by horses, that the car was not stopped as by the statute of the state it was required to be, and, as she claims, by common law it was required to be stopped, at a distance of at least ten feet from the railroad track; but that the driver continued right forward, and was passing upon the track without heeding the fact that his conductor had gone forward to give him the necessary signal as to whether he should go forward or not. That as the car approached the track of the railroad and came to the point where this gate is, the gateman at that time suddenly saw the approaching train which had already come near the crossing; that right at that time he dropped the gate, and as it fell, it hit one, or perhaps both of the horses upon at or near their heads—hit them at any rate—and thereupon the horses sprang suddenly forward, carrying the car upon the track of the railway just

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at the time that the locomotive approached the point of the crossing, and that at that point the locomotive struck the railway car, moving it somewhat—a distance of perhaps two or three feet. The movement was thus light, because it was the custom of the railway train to stop at that point, and while it usually ran across the crossing, it was in fact stopped just at the point where the locomotive hit the car. Plaintiff claims that she was sitting in the car yet, as a passenger, and that she heard an alarm, and immediately started to go out of the car, and passed out on the platform, and was on the platform of the street car just as it was hit by the locomotive; that she was thrown to the ground, and in consequence of that that she received severe injuries, of which she complains; that she was bruised upon her body, had a broken rib, and injuries that have disabled her ever since to some extent from working as she had formerly done, and has caused her to suffer pain and perhaps sickness.

Defendants, by proper averments in their answers, take issue with the plaintiff and deny any acts of negligence.

Upon the trial of the case the testimony of the witnesses tended to prove in substance the allegations of plaintiff's petition. It is claimed, however, by the railway companies, in addition to the matters that I have stated, that as the street car approached the crossing, an employe of the railroad company, to-wit, the station agent, or some person connected with the station, who had charge of the delivery of the mail bag to the postoffice clerk upon the train, had passed out to the place where it usually stopped, and that brought him near the line of the crossing, and he saw this car coming onto the track just as he saw the locomotive approaching near the depot. Thereupon he commenced giving some very vigorous signals, both by calling at the top of his voice and by moving his arm, and otherwise attempting to attract the attention of the driver of the street car, but failed to do so. The testimony of the gateman tends to show that the train was perhaps fifteen or twenty minutes late; that it came upon the track of the Lake Shore road at a point I think five or six hundred feet north of this crossing, and perhaps more than that; and that his custom was to keep watch, and at the time when it came upon the track of the Lake Shore road, passing off the tracks of the Michigan Central road proper, to lower the gate. He says upon this day he failed to lower it as usual, for the reason that inasmuch as the train was late, and the time was getting to be between three and four o'clock in the afternoon of a winter's day in January, it became necessary for him to attend to



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his lamps, which he was in the habit of cleaning, repairing, perhaps, and lighting, and setting out at some points along the line of the track there for the purpose of giving light to the employes, and for that reason he did not see the train until it got within a limited distance; that then he started out to drop the gates, and he saw that the one gate had hit the horse nearest to him, somewhere about the ear, and fearing that if he kept the gate in that position it might injure the driver who was on the car, he immediately raised it, and the car passed along the track and the collision occurred.

It was contended, or suggested, perhaps, in the argument by plaintiff in error; that, strictly speaking, under the allegations of the petition, the plaintiff was not a passenger upon the street car at the time that accident occurred. There was some suggestion that she had passed off the car, and if I understood the matter correctly, some suggestion that she passed beyond the point for which she had taken passage; and for that reason, under the allegations, her passage had terminated. We think, however, under the evidence, that there can be no question but what she was at the time that they arrived at or near the crossing, lawfully a passenger upon the street car, and entitled to all the privileges and immunities of a passenger; and we think, in the light of the testimony, that the jury may well have found that she had not alighted from the car at the time that the collision commenced, and that she was till a passenger, or if she had alighted, she had done it so recently and so immediately in connection with the whole transaction that she was still entitled to the rights of a passenger. There was a lady seated in the car who was reading, and when the horses started she didn't notice them, and she did not look at them until the locomotive got very near the car. She then happened to look around, and the locomotive was immediately upon them. She was sitting at the forward end, and she cast her eyes to the rear end of the car, and noticed that all but one man had got out of the car, and she herself started to arise and do the same thing, but before she had scarcely made a movement towards it the locomotive had struck the car.

There was no argument submitted to us that the verdict was not sustained by sufficient evidence, but the attention of counsel was confined more to the charge of the court. It was very earnestly contended that the charge of the court was erroneous, especially in giving what was known as the second request of the plaintiff. The plaintiff fell into the habit, which is sometimes fallen into by attorneys, of re-

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questing propositions that may be found in the syllabi of some case decided by the supreme court, without properly adjusting them to the condition of the case, so that they come before us in somewhat of an awkward manner. The court gave to the jury among others, plaintiff's second request, modified to read as follows:

"It being admitted that the defendant, The Toledo Consolidated Street Railway Company, is a carrier of passengers, if the jury find that on the occasion mentioned in the petition the plaintiff was a passenger of defendant's car, having paid her fare as stated, it was the duty of the defendant, The Toledo Consolidated Street Railway Company, to carry her safely to her point of destination. The failure thus to do put the defendant, The Toledo Consolidated Street Railway Company, *prima facie* in the wrong, and the burden of proof devolves upon it to show that the injury was the result of an accident, and that it could not have been prevented by the exercise of that reasonable care and skill which prudent men are accustomed to employ under similar circumstances."

It was claimed among other things that in giving this charge, especially in giving the charge that the company was under the obligation to carry her safely to that point, it violated the general rules that govern the conduct and liability of railway companies or common carriers, and really made them the insurer of the safety of the passenger, while they were only bound to use a certain degree of care for the purpose of carrying the passenger safely, or for the protection and care of the passenger, and in that respect it had increased the duty and obligations of the railway company beyond that which the law ordinarily imposes upon them; and, taken in connection with another charge that I shall read later on, it is claimed that it was virtually a charge to the jury to return a verdict for the plaintiff as against the defendants. We were very much impressed with the arguments of counsel made at the time of the hearing in this court, but our duty has been very much abridged by the decision that was referred to by counsel for plaintiffs in error as well as counsel for defendant in error. *Iron R. R. Co. v. Mcwery*, 86 Ohio St., 418. In this case, upon an examination of it, we find that the court of common pleas upon the trial in that court, had given to the jury a proposition substantially in the language of the proposition that was given by the court in this case at bar. We have compared them, and they seem to be substantially the same. In that case the plaintiff below had taken passage upon the rail-

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road of the defendant company, and ridden from the city of Ironton to a place called Etna station, and the train, it seems, was stopped on the road on account of some cattle that had strayed upon the track, and as the locomotive again started a coupling broke or gave way, leaving the car in which the plaintiff was riding, standing on the track. In the course of from eight to ten minutes a coal train, belonging to defendant, came up behind and ran into the rear car of the standing cars, causing an injury to the plaintiff. Judge Boynton, in delivering the opinion of the court, says, on page 421:

"This is a petition in error by the plaintiff, to reverse the judgment of the district court for wrongfully affirming the judgment of the court of common pleas for alleged error in the charge of the court to the jury; and a cross-petition in error by the defendant in error to reverse the finding of the district court that the judgment rendered on the verdict was excessive, and that, consequently, the judgment ought to be reversed, unless he, the defendant in error, would remit the amount of the judgment in excess of \$1,500.

"Whether a presumption of negligence arises, in all cases, against a railroad company, from the mere fact that an accident has occurred from which a passenger receives an injury while being carried over the road of the company, is a question not arising in the present case, and therefore is not determined; but where an injury results to a passenger from a collision of the trains of the company, we have no doubt that a prima facie presumption of negligence arises against the company, and that unless the company relieves itself from liability by showing that the injury did not result from its carelessness, or by showing contributory negligence upon the part of the passenger, judgment should be rendered against it. To this effect the authorities seem uniform.

"We therefore think the court did not err in charging the jury that the burden of proof was on the defendant below, to establish the fact that the injury did not result from its negligence."

And the judgment was affirmed. It will be perceived that while the court laid down the doctrine that where the injury results from a collision between the trains of the company, the burden thus is thrown upon the defendant company to show that it had not been guilty of any acts of contributory negligence, or any acts showing negligence on its part; yet while it makes that statement, the charge of the court as given was an universal charge as it was in the case at bar:

"It being admitted that the defendant is a carrier of pas-

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sengers, and that, on the occasion mentioned in the petition, the plaintiff was a passenger on defendant's train, having paid his fare as stated, it was the duty of defendant to carry him safely to the point of his destination without injury."

For one, I should be very much inclined to reverse a case where a charge of that kind was given, even although the facts were such as are set forth in *Iron R. R. Co. v. Morey*, supra, for this reason: that it states an universal proposition, and the jury might not properly apply it, if it were not charged in regard to the nature of the rule of law, or the exceptions to it, or the limit put upon it by the supreme court in this case. But the supreme court, with that charge before it, without anything further, so far as I can see to modify or to qualify that charge in any way, did affirm the judgment of the court of common pleas, because upon the facts of the case, if the rule of law had been stated just in accordance with the facts of the case, the burden of proof would have been shifted upon the defendant. In *R. R. Co. v. Walrath*, 38 Ohio St., 462, that case is referred to, but it does not throw a great deal of light upon the first part of the proposition, as to whether that is the universal rule. This is a case where a party had taken a berth in a sleeping car and during the evening, while he was sitting in his proper seat—that upon which his berth was to be prepared for the night—the upper portion of the car fell upon his head and injured him seriously. On the trial of that case in the court below, the court had charged the jury that, "A mere statement that a person was injured while riding on a railway, without any statement of the character, manner or circumstances of the injury, does not raise a presumption of negligence on the part of the railway company. But if the character, manner, or circumstances of the injury are also stated, such statement may raise, on the one hand a presumption of such negligence, or, upon the other, a presumption that there was no such negligence. If the plaintiff was in fact injured while sitting in his proper place, by the falling on his head of the upper berth, while said upper berth ought to have remained in place above, such fact raises a presumption, in this case of negligence, for which the defendant is liable." That case was affirmed, and the charge of the court was approved. They refer to the *Mowery* case, stating that the general question was carefully considered in *Iron R. R. Co. v. Mowery*, supra, and we think the principle of that case sustains the court below in the charge given and in refusing the charge requested.

In *Huff v. Austin*, 46 Ohio St., 386, reference is made to

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the Mowery case by the judge who delivered the opinion, and the broad statement is made there that, "The fact of injury having been suffered by any one while upon a railroad company's train as a passenger should be regarded as prima facie evidence of the liability." That I think is not supported by the case of *Iron R. R. Co. v. Mowery*, supra. In this case the question that was before the court was, whether the proof offered in a case where a party was sued for injuries which resulted from the explosion of a boiler, that the boiler had exploded, made prima facie a presumption of negligence on the part of the defendant, the owners of the building in which the boiler was situate, who were operating the boiler. The supreme court held that it did not, the statement in the syllabus in *Huff v. Austin*, supra, being as follows: "That in an action for damages, the mere fact of the explosion did not raise a prima facie presumption of negligence on the part of defendants." The judge, in delivering the opinion of the supreme court, says, on page 890:

"By reason of reliance for personal safety, of passengers upon the carrier, and of the high degree of care and diligence which the law requires towards those with whom there is a relation of trust and confidence; courts have held that, the fact of injury having been suffered by any one while upon a railroad company's train as a passenger should be regarded as prima facie evidence of the liability."

That is a broader statement than that in *Iron R. R. Co. v. Mowery*, supra, warranted.

Another charge that was given was this:

"By the words of the statute, 'from the crossing', means that the car and the horses are to be treated as one; and that the cars and the horses as a whole must be brought to a full stop not less than fifty feet from the railroad track."

The court approved of this request, and that is alleged as a ground of error; and the contention on the part of the plaintiffs in error here is that under the statute only the car is required to be stopped within the distance named by the statute, to-wit: ten feet from the railroad; and that it does not cover the horses in case of a street railway company which operates its cars by means of horses. The statute that is referred to is the act of May 4, 1891, and it is entitled: "An act to provide for the safety of street cars, crossing one another's tracks, and the tracks of steam railways." The first section provides in regard to street railway

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crossings where the tracks are at a common grade. The second section provides:

"That whenever the tracks of any street railroad in this state cross the tracks of any steam railway at grade, the street railway company operating said line of cars shall cause their street cars to come to a full stop not nearer than ten feet nor further than fifty feet from the crossing, and before proceeding to cross said steam railway tracks, shall cause some person in their employ to go ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said street cars, and said street railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

In the third section it provides for penalties against employes who shall violate the provisions of the statute; also provides for a personal liability on the part of said employes; also provides that "The company in whose employ such person having charge of said car or cars is, as well as the person himself, shall be liable in damages to any person or persons injured in person or property." Then there is a clause here in brackets "Having charge of such car or cars," and then the words "As aforesaid." I think I will leave out the brackets and say "person or property as aforesaid." I don't quite understand what the balance of that means. We have given consideration to this charge and to the arguments of counsel, and I don't know that we have any decisions to guide us in regard to the decision of the question; but after deliberating upon it and discussing it, and giving it our best judgment, we have come to the conclusion that a fair construction of that statute, taking into consideration the objects and purposes for which it is passed and the consequences that are liable to follow from a disobedience of it, will be that the horses attached should be taken as a part of the carriage, if I may use that word; that is to say, when it speaks of the car, it speaks not only of the car proper, but of the whole arrangement by which the car is carried forward—by which the passenger is carried, and by which the results are attained for which the car is intended, to-wit: the carriage of passengers from point to point, and for the protection of passengers. The evil is quite as actual, it seems to us, from driving horses within ten feet of the line of the road as from driving the car itself. It is said, of course, that the horses might be turned to the right or to the left, and then the car go that distance; but it seems to us that a broad and fair view of it is to take the whole carriage into



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consideration—the horses that draw it and the car that carries the passengers—and that the intention of the legislature was that that instrumentality should not be brought within a certain distance of a railroad until the observer was sent ahead from the car and signaled back that the track was clear for the passage of the car; and that for the purpose of preventing any injury by a person carelessly or negligently driving upon a railway track.

This charge having been given, it brings us back to the resolution of the other charge, and to the question whether within the principle of the decision in *Iron R. R. Co. v. Mowery*, *supra*, error intervened of which the plaintiffs in error can avail themselves upon this position in error. By some regulation either of the council of the city or the state authorities, possibly by both, it would seem that a gate is required to be kept by the railroad companies at this crossing, or at any rate it is kept. It is kept for the purpose of preventing persons from driving upon the tracks when trains are approaching, and as a matter of course, for the protection of persons who are passing along the street. The supreme court were called upon to pass upon an injury which resulted to a party, and the rights of a person who was driving, and the rights of the railroad company and the liabilities of the railroad company, a short time since in *Railway Co. v. Schneider*, 45 Ohio St., 678; and it says in the third syllabus in the case:

“3. When gatemen are maintained at such crossings, it is their duty to observe the tracks and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and when it is so, to close the gates and keep them closed to prevent persons from going upon the tracks so long as the danger continues; and when the tracks are clear, or persons may cross without danger from passing cars and locomotives, then to open the gates and keep them open to enable persons to cross, so long as it is safe for them to do so, but no longer. Persons approaching the crossing or about to cross have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from disregard by the gatemen of their duties. Hence an open gate with the gateman in charge is notice of a clear track and safe crossing, and in the absence of other circumstances, when the gates are open and the gatemen present, it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass

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on to the tracks through the open gates without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor in such case is their failure, when at a distance of twenty-five feet from the track, to look for locomotives one hundred and fifty feet or more from the crossing, negligence, though they could have been seen."

As I have stated, as this car approached the crossing the gates were not lowered as soon as they should have been, and there was unquestionably a dereliction on the part of the gateman in watching for that train. It was late, and liable to approach at any moment. He was negligent in not seeing it and dropping the gates so as to prevent any person crossing. He says that as he went out there was a car crossed, called "salt car:" that is to say, a car that was used by the employes of the road in spreading salt upon the track of the railroad. He says that he commenced to drop the gate as soon as he could after this salt car passed. There is contradictory testimony in relation to the position of that car. So far as the street car is concerned and the driver of it, as the car approached the track the conductor got off the car and started around to the south of the car, as I understand it, that he had got off of. The salt car had come up to the double track. He proceeded in that direction in the performance of a duty, and had got up somewhere on the line of the heads of the horses at the time the gates had commenced to fall, but had not yet reached the railroad track. The driver was on the front of the car, and it was said by one of the witnesses that he jumped off the car as he saw the gates falling. His own testimony is that he did not jump off until the horses had jumped past the track, about the time the injury occurred. There is testimony tending to show that the brakes were set upon the car as they were found after the accident, and that they were perhaps set before the car got upon the track. But the testimony all shows that the horses were proceeding and the driver was not stopping them—that is, he did not bring them to a dead stop. There was one thing occurred that was out of the usual and ordinary course, to-wit: this employe of the railway company, who had charge of the mail bags, was making diligent efforts to stop this driver from driving his car upon the railroad track. If I remember right, there was a person from the other side. There was also this statute that prohibited the passing of a car beyond a point within ten feet of the track until the conductor should signal for it to come forward. This statute is passed without any regard to the



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fact that gates are to be kept at crossings by railway companies. It is a regulation that is quite general, and I believe, by the statutes of the state, is to some extent under the control of the commissioner of railroads. Now then, what is the situation in regard to the charge of the court? We are of opinion that under the situation and the facts of the case as here stated, the driver of the street car driving the car upon the track, as he did, there was negligence on the part of the street railway company such as, under this rule, would cast the burden upon it to show that there was no negligence on its part, or that it had used ordinary care. We have taken into consideration the argument of counsel, the decisions of the supreme court and the rules laid down there by them; we have read the case that was cited by counsel from the Washington Reports; but we think that the rule that should govern in this case falls within that latter clause of the decision of the supreme court in *Iron R. R. Co. v. Mowery*, supra, and in the cases that are there referred to; and the rule is substantially this: that where the negligence occurs by the collision of the cars, by the breaking of machinery, or by any act that is done by the railway company, or by the employes, which has contributed to the injury which is complained of, the burden of proof should be upon the defendant railway company.

Under this view of the case, and under that decision, and the prominence of that decision, and considering the manner in which it was affirmed by the supreme court, we do not feel at liberty to reverse this case. We think that if counsel for the railway company seek to challenge that decision, or the results of it, it should be before the tribunal itself which made the decision, and allow them to change or modify it, if they see fit to do so.

Some question was made with regard to the liability of the steam railway company; but under the decision that I have already read, in *Railway Co. v. Schneider*, supra, we do not see how the two companies can escape liability; at least we think the jury was right in holding that they were liable for negligence contributing to this accident.

We therefore, on the whole view of the case, affirm the judgment of the court of common pleas, but will certify reasonable grounds for taking the case to this court, and the case will be remanded in the usual form.

Plaintiffs in error except.

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Toledo Board of Education v. The City of Toledo for use of.

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(Sixth Circuit—Lucas Co., O., Circuit Court—March Term, 1890)

Before Scribner, Bentley and Haynes, JJ.

TOLEDO BOARD OF EDUCATION v. THE CITY OF TOLEDO FOR USE OF COGHLIN.

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*Assessment of school property for sidewalks and sewers in front of it—*

School property in a city school district is chargeable for an assessment by the front foot under our statutes for a sidewalk in front thereof, or for a sewer, and the board of education has to pay the same.

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¶ (This case was reversed by supreme court, holding that the school property cannot be assessed for the expense of constructing a sidewalk or sewer in the street in front thereof, but that the amount has to be paid out of the general fund of the city, 48 Ohio St., 84, 87.)

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(Sixth Circuit—Lucas Co., O., Circuit Court—October Term, 1897.)

Before King, Haynes and Parker, JJ.

THE MICHIGAN CENTRAL RAILROAD COMPANY v. MARY SHEA, Adm'r., etc.

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*Rules of R. R. Co.—Violation of, as cause of injury to employe—*

The non-observance of one of the rules of a railroad company will not of itself render the company liable for injury to one of its brakemen unless it is shown that the dispensing with such rule of the company was the proximate cause of the injury.

- (Affirmed by Supreme Court without report, 39 Bulletin, 173; 58 Ohio St., 689.)
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HAYNES, J.

A petition in error has been filed by the Michigan Central Railroad Co. in this case for the purpose of reversing the judgment of the court of common pleas, rendered in favor of Mary Shea, administratrix of the estate of William Shea, deceased, against the defendant in the court of common pleas. Mary Shea, as administratrix, brought suit in the court of common pleas against the Michigan Central Railway Co. and the Wheeling & Lake Erie Railway Co., for alleged negligence that had caused the death of William Shea, who was a brakeman upon the train of the Wheeling & Lake Erie Railway, upon a line of railroad within the

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limits of the city, either upon the approaches to or upon the road itself, of a line known as the Belt Railway Co. The issues were joined in the case, and it proceeded to trial in the court below, and at the conclusion of the testimony the court directed a dismissal of the case as to the Wheeling & Lake Erie Railway Co., and the case then proceeded against the Michigan Central Railway Co. to final judgment, and it is only with the evidence as bearing upon the Michigan Central Railway Co. and the judgment against it that we have to do in this case. A motion for a new trial was filed, and the same was overruled. The principal grounds urged for a new trial were that the verdict was not sustained by sufficient evidence, and was contrary to law. These are the sole questions that are submitted for our consideration by the railway company upon its argument here.

The point where this injury took place is where a spur, or curve rather, of the railway company connects, as I understand, the main line of the Wheeling & Lake Erie with the Michigan Central Belt Line. Shea was a brakeman upon a train of sixteen cars which was being backed by the Wheeling & Lake Erie Railway Co. from its main line around onto the Belt. The train was a Wheeling & Lake Erie train, and the men upon it were all employes of the Wheeling & Lake Erie Co. The train was backing at a rate of about—the witnesses vary—from five or six miles an hour to twenty miles an hour. The grade was slightly an up grade. The train had crossed Mud creek bayou, and was approaching what is known as Manhattan crossing, which is the road leading to the old town of Manhattan, at or near the banks of Ten Mile creek. The Michigan Central Railroad Co. had some men employed in putting in some interlocking switches in the Belt Line road, and in putting in those switches they had loosened one of the rails of the track, and perhaps they had taken it out, and had replaced it and had partly fastened it. Some cars had passed over it, but it was not fully fastened in place, when the person in charge of it saw this train coming, some hundreds of feet away, and directed one of his employes, who was some two hundred feet from him, to go down and give notice to the coming cars of the danger. This man started off on a trot, as he calls it, and proceeded down to a point near the Manhattan crossing, and when he was quite near

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the train he then gave a signal, which was responded to by Shea, his position as brakeman being upon the rear end of the train—being in advance as the train was backing up. Shea, in the presence of this witness, repeated that signal, and as he repeated it, seized hold of the brake wheel and gave it a turn, or a partial turn, and as he did so went off of the car and underneath it, and was run over by some of the cars before they were stopped. The allegations in the amended petition in regard to the acts of negligence were, generally, two—cna, that the company had not sent back any flag, or notice, or placed any flag or notice along the side of the track to give notice to those cars coming that there was a rail taken up; secondly, that it was the duty of the engineer on that train, and of the conductor, to stop their train two hundred or eight hundred feet from the railroad crossing; that the conductor and engineer omitted to do that, and that as the result of that the train was stopped suddenly, and the decedent was thrown off. The only allegation we can see against the Michigan Central Railway Co. is that that it did not send back or cause to be placed some sort of a flag a sufficient distance from the point where this rail was taken up, to notify the coming train, so that upon seeing that, they would have plenty of time to stop their train slowly, so as to protect the lives of the persons who were upon the train.

Upon the trial of the case the plaintiff first called as a witness Henry Hackman, of whom I have spoken. Hackman, as I have said, was in the employ of the Michigan Central Railway Co., and was standing with his foreman a distance as he states of perhaps a couple hundred feet towards the point from which the train was coming. He was directed to proceed down, and he did so, as near as he could make the distance, some three hundred or four hundred feet, making a distance of five hundred or six hundred feet from the point where the rail was taken out, and met the train backing up. He said he stood about a car length from the train and gave a signal which he called a slow signal, by raising his arm up and down, and that was repeated by the brakeman, as I have already said, and the brakeman then took hold of the brake, and upon turning it partially he went off of the train. This man says he perceived no jar, heard no jar—no running together of the

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cars—at that time, but it looked to him as if the brakeman simply lost his hold and fell off, but how, of course, is merely a matter of opinion. The engineer was also put upon the stand, and testified. He testifies that when he first received a signal to slow down the train, he received it from this brakeman Shea, Shea being in a position on the train where the engineer could see him. They were on a slight curve, and the point along which he would look would be on the side of the curve, from which he was enabled to see Shea. The signal that Shea gave him was what he calls a slow signal, and thereupon he commenced to slow the train. Soon thereafter the conductor, who was on top of the train, perhaps two cars away from the locomotive, according to the testimony of the engineer and fireman and of the conductor himself, gave a signal for a sudden stop, and thereupon the engineer put on his brakes and shut off steam, and threw sand on the track, and took steps to bring this train to a sudden stop, and it was brought to a stop. The conductor says at the time he gave this signal to stop suddenly that he received a like signal from the brakeman Shea, and that he repeated the signal which the brakeman Shea had given to him. That testimony is not varied by the testimony of any witness that I have discovered, who testified. That seems to have been substantially the condition of affairs, that so far as the engineer on that train was concerned he received two signals—one to stop slow, and he commenced to do it, and then another signal to stop suddenly. The one he received from Shea himself, the other he received from the conductor. There is no testimony to show that the person who had been sent back to give the signal—this man Hackman—gave what is denominated a hard signal. It was argued that the signal that he gave must have been the signal that was given by Shea. I am reminded, and perhaps it might as well come in here, that while these two signals, as I have said, were given before Shea fell off, as testified by Hackman, that Hackman testifies that after Shea fell, finding he was under the train and it was necessary to protect him—to endeavor to protect him—he started up upon the banks adjoining the cars, and then give a signal to stop, a hard signal. That signal was made to the conductor, and was repeated.

A rule of the Michigan Central Railway Co. was offered,

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which provides that when taking any rail out of the track on the line of the road certain notices shall be given, and if they are taken out of the track in any other portion of the road, a flag shall be sent back a distance of twenty-five telegraph poles. The court very properly charged the jury that the dispensing with this rule of the company, unless it was the proximate cause of the injury, would not of itself make the company liable. It was a matter of fact to be considered by the jury as to whether the railroad company was guilty of negligence or not. It has been argued here that they should have sent back and placed that flag, and because they did not do it they should be held liable; or that the jury were authorized to find that there was a liability on the part of the company, and that it had been guilty of negligence. It seems to us that the situation of affairs, as far as the railroad company is concerned, is this: they were fixing this interlocking switch. It is claimed that the rule didn't apply to the Belt line, but whether it did or not, they were fixing this interlocking switch, and incidentally took out a rail. They didn't send any flag back, because they were to have it out but a short time, and were keeping a lookout for any cars or trains approaching. In that lookout they saw this train approaching at a sufficient distance to give it all the notice that was required, and all the notice that was needed, to enable the train to come to a stop, even assuming that they were not obliged to stop before reaching the crossing. They had all the time that was necessary for the train to come to a halt at a slow rate of speed. And they sent Hackman back who gave a notice to the brakeman, and that notice was a slow stop notice. We think there was no evidence before the jury that there was any negligence on the part of the railroad company directly contributing to the death of this decedent. We are utterly unable to see from a very careful examination of the testimony of these various witnesses, upon what ground the jury could have proceeded to render a verdict against the defendant railway company; and for the reason that the verdict is not sustained by sufficient evidence, the judgment will be reversed, and the case remanded for a new trial.

MR. SCRIBNER:

If I understand from your decision, if we had proved it

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was a hard signal, we would have made a case—that is, if there was such proof that would satisfy the jury that the signal was hard, and this train stopped suddenly?

JUDGE HAYNES:

I don't know that I have discussed that in that form. Of course it might be a stronger case before the jury.

MR. SCRIBNER:

That would throw the whole burden on the company, giving the hard signal?

JUDGE HAYNES:

We won't say that, Mr. Scribner.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1892.)

Before Bentley, Haynes and Scribner, JJ.

JENNIE S. PAIGE et al. v. WILLIAM CHERRY.

*State canals—Manhattan branch given to Toledo—Title to lands—* While the act of the legislature of 1868 gave to the city of Toledo an easement in that part of the Miami canal known as the Manhattan Branch, for street, water and sewerage purposes, it was the act of 1871 which gave to the city the full title, not only in the bed of that part of the canal, but also in all the land held by the state for canal purposes within the limits of the Manhattan branch of the canal, and the city had thereupon the power to give a full and complete title to part of such lands to a purchaser thereof. And an action in ejectment, brought within twenty-one years from the passage of the act of 1871, by a purchaser from the city of Toledo of part of such land, against one holding adverse possession thereof, but brought after the lapse of twenty-one years after the passage of the act of 1868, is not barred by the statute of limitations.

(Affirmed by supreme court, without report, 83 Bulletin, 64.)

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Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

In this case a petition in error is filed for the purpose of reversing the judgment of the court of common pleas in a case wherein William Cherry was plaintiff and Jennie S. Paige and others were defendants.

The action below was an action in ejectment. The premises in controversy are situated in the city of Toledo, within the limits of the lands formerly occupied by the state of Ohio for the Miami and Erie Canal.

The case was tried to the court, by consent of the part-



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ies, and without the intervention of a jury. A finding was made and conclusions of law stated, and upon that finding of facts and the conclusions of law a judgment was rendered for the plaintiff in the court below.

The main controversy that has been argued and submitted to us is, as to the statute of limitations—whether the case made by the plaintiff is barred by the statute of limitations.

The finding of facts, in brief, states: That the lands were a part of the original tract No. 1, etc., and that the lands described in the plaintiff's petition embrace the lands of what is known as the Manhattan branch of the Miami & Erie canal, the same as formerly occupied by the city of Toledo. That in 1836 the board of public works, under and by virtue of certain statutes then in force, appropriated this land for the use of that canal, and that afterwards, to-wit, February 20, 1868, the state of Ohio granted to the city of Toledo authority and permission to enter upon, improve and occupy as a public highway and for the use of water pipes and sewerage pipes forever, all that part of the Miami & Erie canal known as the Manhattan branch.

They further find that up to June 29, 1869, the state still continued to use the canal for the purpose of carrying water through it, and also for the purpose, to some extent, of allowing boats to pass up and down the line of the canal.

Afterwards, on the second of March, 1871, the state, by a quit-claim deed of said date, executed in due form, granted, quit-claimed and conveyed to the city of Toledo the said land involved in this action, said deed being in terms and executed in conformity to the act of the general assembly passed on January 31, 1871. That afterwards, on January 28, 1888, the city of Toledo, by a deed of said date, made in pursuance of the authority of the common council of said city of Toledo, conveyed a portion of these lands to the plaintiff, being the lands in controversy; that is to say, to William Cherry. That in the year 1857, Joseph Paige, an ancestor of the defendants, erected on a portion of this property a double dwelling house, and also inclosed by a fence a portion of the land, and a certain other portion he used in connection with the land as a right of way. And the court finds as a matter of fact that from that date forward said Joseph Paige and those claiming under him have been in open, notorious, continued, adverse and exclusive possession of a certain portion of the lands in question—eleven and a half feet of the premises involved in this action. And the court, from these facts, found as a conclusion of law, that the statute of limitations did not commence to run un-



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til the title vested in the city by virtue of the act of 1871 and that therefore, this action is not barred by the statute of limitations, and therefore found in favor of the defendant below.

It will be seen that under the act and deed of 1868, more than twenty-one years have elapsed since the date of that deed up to the time of the commencement of this suit, for this suit was commenced on September 15, 1889; that from the date of the deed of the city of Toledo, under the act of 1871, the twenty-one years have not elapsed, and the contention here, on the part of the plaintiff in error is, that the city of Toledo had the right to commence the action, under the deed made to it by the state in 1868—had the right to commence the action in 1868, and that inasmuch as it failed to commence the action during the time it held the title, and that the plaintiff failed to commence it within the twenty-one years, therefore the action is barred.

The contention on the part of the defendant in error is, that he has a right to claim under the deed of 1871, and that he would not be barred until some time after the commencement of this action.

The acts under which the parties claim are: the acts of March 26, 1864, Session Laws of 1864, page 57, and the act of January 31, 1871, Session Laws of 1871, page 17.

It is admitted by both parties that the statute of limitations would not commence to run against the state of Ohio so long as it possessed the legal title and the right of possession. And it is claimed, first, by the plaintiff in error, that the act of March 26, 1864, and the grant from the state of Ohio to the city of Toledo in February, 1868, in pursuance thereof, was in effect a complete dedication of the land in question for street purposes and forever vested whatever title the state then held in the city.

We are not able to agree with counsel in the conclusion stated in this proposition. We suppose the law to be that, under the statute of 1864, and the deed made in pursuance of it in 1868, the city was simply vested with what may be termed an easement—the right to use the canal for the purposes of a highway and for the purpose of conducting water and gas-pipes through the city, and that all other rights in respect to the land remained in the state of Ohio as owner thereof. The law upon that subject is stated by the Supreme Court fully in *Platt v. Pennsylvania Co.*, 48 Ohio St., 228, 244, and is in line with the law as stated by the courts of other states, as appears by the cases cited on behalf of the defendant in error.

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It is claimed also by the plaintiff in error, that the city of Toledo, upon receipt of the deed from the state, had the right to commence an action for the purpose of ejecting these parties; that the right of action in its behalf accrued at that time.

This is denied on the part of the defendant in error. The defendant in error claims, first: that the state remained in possession of the property for some time, using it, as has already been stated in the finding of facts, for the purpose of conveying water to certain mills at the end of the canal, and also for the purpose of permitting parties to pass over it with boats, which was done, to some extent, for the ordinary purposes of navigation. The defendant in error further claims that no action in ejectment will lie for recovery simply upon an easement, the proposition being that the city could not have maintained an action in ejectment prior to the grant of 1871, because it had only an easement.

We are unable to agree with counsel for defendant in error upon this point. The case of *Lessee of Incorporated Village of Fulton v. Mehrenfeld*, 8 Ohio St., 440, we think settles, so far as the state of Ohio is concerned, the law of the case upon that point; and in that case it was practically held that where a village had received by dedication at common law, certain property for street purposes, that the village had a right to maintain an action in ejectment for the purpose of evicting those who were wrongfully upon the land. So that we agree with the plaintiffs—that the city had the right to commence an action in 1868 upon the receipt of that deed. But while the city had the right to commence that action, it could only commence it for the right of possession for the purposes of a street. There still remained in the state of Ohio an ownership in the land, the title of the land, for all purposes except for the purpose for which it had granted an easement to the city of Toledo, and we have no doubt that the state of Ohio had the right, after the conveyance of 1868, to commence an action of ejectment for the purpose of adjudicating the title to the land, or ascertaining its title to the land, as against the parties defendant who were in possession of this portion of the land, and that conclusion is sustained by a large line of authorities. That right continued in the state of Ohio down to the date of the deed which was made under the act of 1871, and that right was transferred by virtue of the deed of 1871, to the city of Toledo; from that time forth, the city of Toledo stood in the shoes of the state of Ohio, and was possessed of its rights in regard to the legal title

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to the land, and would have the same right to commence a suit to evict these defendants and to settle the question of title to the land that the state before would have had; and the particular trouble in the matter in regard to that point—or the question that has engaged our attention, is, whether or not, if recovered at that time, it would be recovered subject to the right of the city, or of the public—if you please—to have this portion of the canal used for the purposes of a street, and whether if the statute of limitations had run as against the city in regard to the possession of the property, that right which is obtained by virtue of the statute, having run for a period of twenty-one years, would inure to the benefit of these defendants, and whether under that they could commence suit against the city and bar the city as to possession although they might have a finding in favor of their title; and we are satisfied, upon final and full examination of the case, that, so far as the use of that property is concerned, for street purposes, that that easement which the city had acquired by the first deed was merged in the full title which it had acquired by virtue of the second deed, and that when it acquired the second deed it had full and complete title in fee of the premises, without any obligation imposed upon it so far as the public was concerned, and so far as these parties were concerned, to continue to use that canal for the purposes of a street or highway.

We think these questions are settled by *Malone v. Toledo*, which has been to the Supreme Court twice, and was decided first in 28 Ohio St., 648, and again in 34 Ohio St., 541. The *Malone* case involved the right to some property adjoining this property, and this property is situated or abuts upon a part of lot 308, which is in the Port Lawrence division of the city of Toledo. Malone owned lot 309, and by virtue of his ownership of that lot, claimed to own the canal, and, as may be remembered by many persons, he built upon it a carpenter shop and had possession of it under advice of counsel, and then brought an action in the court of common pleas, to quiet his title. A demurrer being interposed and answer being filed, the case went to the Supreme Court, and the court passed upon it and it came back to the court of common pleas, and there Judge Pugsley was made a party, he having purchased from the city the property in question. The case went back to the Supreme Court, and the question that was in controversy was: Whether the title of Mr. Malone, on account of his title to lot 307, extended into this canal, the same as if he were a riparian owner of prop-

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erty, or whether the city had the full and complete title, and had the right to convey that full and complete title to Judge Pugsley; and the decision of the court was that the city, by virtue of the acts of 1868 and 1871, had a full and complete title to the land, and the appeal of Malone was dismissed. So that they, in fact, decided that the city owned the property by a full and clear title, and had a right to make a conveyance of it to any person or party who chose to purchase from it. Following that decision, the plaintiff, William Cherry, has made a purchase of that property, and has received from the city a deed of it. But that settles, we think, this: that there was no obligation on the part of the city of Toledo to use this canal for a public highway; that they had a right to sell it for any purpose and for all purposes; that their title was a full and complete title, and that whatever rights—practically—they had received by the deed of 1868, were merged in the more complete title which they received by the deed of 1871.

If we are correct in that conclusion, it follows, we think, without any question, that when plaintiff brings an action of ejectment under the act of 1871, he brings it for a full and complete title and without any bar that might have accrued to these parties prior to the commencement of this suit by virtue of the right to commence a suit against the defendant under the deed of 1868 making a title which would prevail against the title made by virtue of the act of 1871, and that, when a judgment is rendered under the act of 1871, conferring title as held by virtue of the act of 1871, that it is a full title, and will prevail as against the rights of these defendants.

We think, therefore, that the court did not err in holding that the statute of limitations would not avail as against the title of the plaintiffs in this case on the finding of facts.

The plaintiff also raises another question, and that is: In regard to the quantity of land that was taken by the city under the last conveyance. The last statute, authorizing the state to convey, says "whatever interest remains to the state in the bed of the canal, is hereby relinquished and transferred to the city of Toledo." Now, under the first act—briefly, without stating the language verbatim—the state conveyed so much of the Miami and Erie canal as is known as the Manhattan branch, being that portion of land lying between the Swan creek and the outlet or mouth of the canal where it joins the Maumee river. There is no question but what that is a full and complete grant to use all of the land held by the state for canal purposes in the canal limits,

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for the purposes of a highway; and the act of 1871, reciting the practical abandonment of the canal, undertakes to convey to the city of Toledo whatever remains in the "state", in the bed of the canal, to the city; and by the term bed, it is claimed that they only received so much as lies between highwater mark occupied by the water of the canal between the banks of the canal. This property, it may be remarked, is situated practically on the old berm bank of the canal. But that question, we think, is concluded by the decision of the Supreme Court in the case to which I have referred, because the question is made there by the pleadings—whether it was argued or not, I do not know. But the law in that case bounds the law in this case, and the property in that case abutted and bounded upon the property in this case, and has the same situation, and the decision of the court in that case is, that the city takes the whole title to the whole canal, from Swan creek to the river, and makes no suggestion of any limitation. And it would seem also, from a fair construction of the two statutes together, that it must be so; that when the statute speaks of the bed of the canal, it speaks of that part of the lands of the state which were occupied for canal purposes—for upholding and maintaining the canal—the banks as well as the bottom of the canal; that the term as used denominating the "bed of the canal", means the lands used for the support and maintenance of the canal, the towpath, berm bank, and waters of the canal.

The case is an interesting one, and has occupied our attention for a considerable time; but after a full and careful survey of the authorities cited in the case and the situation of the parties under the decision of the Supreme Court, we are satisfied that the court below did not err in the holding which it made upon the case, and the judgment of the court of common pleas will therefore be affirmed.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1892.)

Before Haynes, Bentley and Scribner, JJ.

THE CITY OF TOLEDO v. WILHELMINA CLOPECK.

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*Injury from defect in sidewalk—What charges not improper—*

- (1.) Plaintiff being permanently injured by a fall caused by a defect in a sidewalk, the court charged the jury that "These injuries alone of health, things of that kind, can not be compensated in money fully, but that is the only compensation the

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law can give to a person if injured by the fault of another." And again: "Money can not compensate for the loss of health; perhaps can not compensate for pain and things of that kind, but as far as is reasonable and proper the jury may go in compensating for those things as far as money will," etc., as more fully stated in the opinion. *Held*, Not error.

*Verdict for \$1000 not excessive—*

(2.) A verdict against the city for \$1000 under the facts of the case not held excessive.

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Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

This case is briefly this: The plaintiff below, Wilhelmina Clopeck, was passing along on Locust street, near the corner of Everett, in the city of Toledo, in company with two other persons, and while so passing along, having an infant in her arms, and being immediately behind the other persons, one of them stepped upon a plank in the sidewalk which was loose, throwing up the plank, and it caught her and threw her to the ground, and she was very seriously injured.

There is not much question made before us but what the verdict was properly found in favor of the plaintiff. The great objection is, that the damages are excessive. There is also some slight objection to the charge of the court.

The truth with regard to the sidewalk was that according to the evidence it had for a considerable distance been in a very unsafe condition; the stringers had become very much decayed, and what little nailing there was in the sidewalk had come out, and it was in a very loose and rickety condition. The court was asked to charge certain matters with regard to that, and the court did charge concerning it, and the charge in that regard, it seems to us, was very favorable to the city.

The contention with regard to the injury is that the woman received injuries, either by the effects of the plank that struck her when she fell, wrenching her shoulder, and she is suffering from a torn ligament in the region of the womb—perhaps in the womb itself. She certainly shows by the testimony of other witnesses than herself that she has suffered from the effects of the fall, and that she is permanently and seriously injured. The jury returned a verdict of \$1,000. This is said to be very high, and very unjust, and one of the largest returned against the city—the largest one being to a boy who lost both legs. After reading the testimony we are very well satisfied to permit the verdict to remain as it is, and not disturb it. We are inclined to think, if there is any fault at all, it is too small rather than too

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large, taking the condition of the woman as it appears from the record here.

The complaint with regard to the charge is that it does not properly state the rule of damages, and that it leaves the matter too loose and indefinite for the jury to pass upon; that the court refused to give certain charges that were requested. The charges that were requested are not in the record; probably some oversight about the matter. We have examined the record and the charge, and we find no request to charge except those that are incorporated in the charge itself, which were given by the court at the defendant's request. The part objected to more particularly is this:

"If you find that the plaintiff has a right to recover on the ground I have already laid out to you, if you find that the plaintiff has a right to a verdict against the city for this injury, then consider the amount. She has a right to recover; of course, you understand these injuries alone of health, things of that kind, cannot be compensated in money fully, but that is the only compensation the law can give for a person if injured by the fault of another."

They object to the court stating that the injuries cannot be compensated by money fully. The court then proceeded to state—

"The injured person has a right to require the person causing the injury wrongfully to make compensation for the injury, and this compensation, as I have already said to you, in law can only be a money compensation. As has been said, it cannot compensate for the loss of health, perhaps cannot compensate for pain and things of that kind, but as far as is reasonable and proper the jury may go in compensating for those things as far as money will. It would not be proper for you to say and consider and go upon this principle that no money can compensate, and therefore we are safe in giving everything that is asked. Look at it fairly and reasonably, and say what in good conscience, justice and right ought to be given under all the circumstances. She can recover for the hurt, for the pain she has suffered, the loss of her health since the injury up to this time, and recover compensation such as you think proper for a weakness, sickness, bodily infirmity and loss of health, that she is suffering from now or may hereafter suffer from or still suffers from on account of this injury."

Quite a number of authorities have been cited. We have examined them with regard to the statements made by courts with reference to verdicts that have been supposed to have



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been too large, and have been found to have been too large. It seems to us that this charge is not open to the objection suggested by counsel for the city. He states what is well known, that money can not compensate for a loss of health. That is a general proposition, of course, that can not be overlooked; but he has charged them to pursue a conservative course—to deal justly and rightly between the parties.

He has charged them that that statement does not allow them to give whatever is asked, or whatever is claimed. He confines it, we think, within proper limits. The charge, of course, might have been more full, and might have stated it in different form, but the substance of the charge was fair enough to the city. We think the jury were not misled by any charge of the court into any extreme measures with regard to the amount they should give the plaintiff, and the finding, as we have already stated, is moderate enough.

We shall therefore affirm the verdict and judgment of the court, but without penalty.

*C. F. Watts*, City Solicitor, and *W. H. A. Read*, for the city.

*Andrew Farquharson*, for Mrs. Clopeck.

(The judgment in this case was affirmed by the supreme court, without report, 52 Ohio St., 642. Minshall and Burket, JJ., dissented.)

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(Sixth Circuit—Lucas Co., O., Circuit Court—1895.)

Before Bentley, Haynes and Scribner, JJ.

THE CITY OF TOLEDO v. LEGRENA LEWIS.

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*Property damaged by water set back by city's action—Recovery—*

- (1). Where the property of plaintiff was injured by the city filling up street and raising catch basins of sewers already paid for by the property owners, whereby the drainage of her lot was destroyed, and the water set back on her lot, making the same unwholesome and untenable, she is entitled to damages.

*Same—Measure of damages—Injury to health—*

- (2). The measure of damages to which she is entitled in such case, would be the difference in the value in the use of the property before and after the acts of the city, during the four years prior to the commencement of the action, as also damages for the injury to plaintiff's health during these four years.

*Same—Continuing nuisance—Limitation of action—*

- (3). In such case the injury to plaintiff's property is a continuing nuisance upon which suit may be brought from time to time, and in which the plaintiff can recover damages for the injury



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suffered up to the time of commencement of the action, and in which the defendant might plead the statute of limitations as to injuries suffered more than four years prior to the commencement of the suit.

*Same—Duty to do all to lessen damages—*

- (4). An owner of property is entitled to damages for injuries resulting to the use of her property by reason of the turning of water upon the property by embankments erected by the city, which otherwise would flow off, and from which injuries accrue to her in the use of the property, and if she suffered in her health from the accumulations of foul water upon her lands caused by these acts of the city, she would be entitled to recover therefor; also, while plaintiff would have a cause of action for the water thus turned in upon her, still the well established rule of law is that she should use reasonable care to protect herself, to lessen if possible the damages which she was liable to suffer by the continuation of these causes of action, and it is a question to be submitted to the jury, whether there was any known or reasonable way under her power and control whereby plaintiff could have lessened that injury.
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Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

This is a matter that has occupied a good deal of our attention, for the reason that it raises some questions that are new even in this court, under municipal law, some that are important and have required considerable attention.

This action is brought to reverse the judgment of the court of common pleas in a case brought by Mrs. Lewis against the City of Toledo for alleged injuries received by her in person and property, that is to say—her health and the use of her property—by reason of the filling of Huron street at the junction of Oak street and Superior street, and the petition is based upon the claim that by the filling of those streets and the raising of the catch basins at the corner, that the water which would otherwise have flown off through the catch basins already furnished at that time, and for which she and other citizens in common had paid, was, by this filling, set back upon the lot of the plaintiff and caused the property to become damp, wet and unwholesome and therefore she lost the use of her property, and thereby was injured also in her bodily health, and she claimed damages and recovered a verdict for two thousand dollars in the court below.

There was testimony to show that Oak street between Huron street and Superior street had been filled in, to some extent, by unauthorized persons, and that the effect of that filling had been also to throw the water upon her lot; but

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that fact was not set up in the petition as a cause of injury to her lot, but that testimony also was allowed by the court to play some part as a cause of damage upon the trial of the case.

The first question that was raised before us on examination of the case is as to the character of that injury, what it is, and whether it is a continuing nuisance or whether it is of that class of injuries for which suit can be brought and a single judgment rendered, and which judgment, when rendered, would be conclusive of the whole question of damages as between the parties to the suit; and, after a very full consideration of the cases that bear upon this question—and a good many authorities have been examined—we are of the opinion that the injury complained of, is a continuing nuisance; that is, one upon which suit may be brought from time to time, and one in which the party who brings the suit recovers up to the time of the commencement of the action. It is one also in which the party might plead the statute of limitations as to injuries which occurred prior to a certain time before the commencement of the suit. In this case, the statute of limitations is discussed a good deal and is adverted to by the court, and the action is limited not very strongly, but rather indirectly, in the charge of the court to injuries arising within four years prior to the commencement of the suit.

Counsel for the city contend very strenuously that there is no rightful cause of action here; that whatever injuries plaintiff did receive, it is in legal parlance *damnum absque injuria*, and we have examined authorities upon that question quite extensively, and we are of opinion that the law of the land is, and ought to be, that for injuries resulting to the use of the property by reason of the turning of the water upon the property by these embankments, which otherwise would flow off, and from which injuries accrue to her in the use of the property, she is entitled to recover; and, further, that if she suffered in her health from the accumulations of foul water upon her lands caused by these acts of the defendant below, that for that she would be entitled to recover.

The causes of action are not stated separately in the petition, the injuries to her health and the injuries of the property are intermingled in one cause of action, but no objection is taken to that. Counsel assume that if there is an injury to her health, that it goes without discussion that she is not entitled to recover, and counsel for defendant prayed the court to charge the jury that "Plaintiff is not entitled

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to recover anything on account of the injury to her health." The case of Story v. Hammond, 4 Ohio, 376, clearly establishes the right of the plaintiff to recover for injuries to her health.

Coming now to the charge of the court, further on, the court was prayed to charge on behalf of the defendant below:

"1. Plaintiff is not entitled to recover anything on account of injury to her health.

"2. Plaintiff is not entitled to recover anything on account of any damage arising from the change of grade or improvement of Huron street.

"3. Plaintiff is not entitled to recover anything on account of damage arising from the change of grade or improvement of Superior street.

"4. Plaintiff is not entitled to recover anything on account of any damage arising from the failure of the defendant to supply drainage for the surface water falling or accumulating on Oak street.

"5. Plaintiff is not entitled to recover anything on account of any damage arising from the filling of Oak street between Huron and Superior streets since the improvement of said Oak street prior to the year 1874.

"6. Plaintiff is not entitled to recover anything on account of any damage arising from surface water flowing or running over to her premises from Oak street or adjacent premises.

"7. Plaintiff is not entitled to recover anything on account of any damage accruing since the commencement of this action.

"8. Plaintiff is bound to use all reasonable care to avoid damage."

In regard to the grading and filling of these two streets, the court charged the jury, as we think, correctly, charged very fully—in regard to the right of the city to fill the street and change the grade. The court also charged that the plaintiff was entitled to recover for injury to her health, within four years, and for injuries resulting to the use of her property; but the court, in our judgment, went further than it ought to have gone, and submitted to the jury questions of damage and causes of damage that the court ought not to have done.

Now, going back to the testimony, witnesses were allowed to testify—I take from page 44, from the testimony of Mr. Losec, and he is allowed to testify what it would cost to raise the house, and then the question was put to him:

"The Court: Q. Take that house and that lot, affected as

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it is by the drainage in its present condition? A. That reduces it the same ratio that the rental value is reduced; that is my opinion. Sold for some other purpose, it might be a different thing.

"Mr. Morris: Q. Can you tell us about how much that would be, in your opinion? A. That, I don't know as I could say. Probably that rental value doesn't represent a proper interest on the value of the property any way, as it now stands. The only way I could answer that question would be a depreciated per cent., which would be fifty per cent. I don't know what value to put on it. I will answer that question in this way; that the depreciation in money value would be \$250 to \$300 a year—in the rental value."

Now that, in our judgment, was competent.

"Q. On the selling value of the property, what would be the depreciation? Assuming that there is no drainage on Oak street; that there is no sewer in the rear and there is no way of reaching it except to go through other people's property, what is its diminution in value in dollars and cents, in your opinion? A. Well, my judgment would be from \$1,000 to \$1,500—what it would cost to put it in tangible shape, and to bring a fair rental."

Well, now, following up that question and some of that class, the court, when it comes to charge the jury, after having charged the jury very fairly and very correctly as we think in regard to the matter, is led to submit to the jury some matters which we think the court ought not to have submitted to the jury, and I will commence to read on page 67:

"If she had an abundance of drainage, if she had a way of letting the water flow away from her lot and from the lot of her neighbors, and the neighbors' property wouldn't shed water on her lot, or any accumulation by unauthorized persons of stuff in Oak street wouldn't add to her burden, she had a right to enjoy her property just as it then was, and the city would be liable for any injury that is the natural consequence flowing from that act. You will remember distinctly what I said. It is not a question, nor would she be entitled to claim damages for the improvement of Superior or Huron streets; but for whatever injury was caused to her by the depriving her of the drainage that she had, of the comfort she enjoyed because the lot was dry and healthy, because of the access, so far as the access was concerned, and because it was a desirable place to live."

Now the question of access to the property was in no manner made before the jury, or if it was made in any way,

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it was not a cause of action, because of the very fact that they had a right to fill these streets at these crossings, and any injury to the access of the property thereby would be a matter for which she could not recover. That is also stated, and that, as a general rule, would be so; but in submitting the question of damages, it is submitted to the jury in such form that they would have a right to take that into consideration and pass upon it, and settle the whole question so far as his suit is concerned as to any loss she may sustain to the lot by the grade being higher; in short, he submits the same questions to them in this case that he would submit to them if the suit was brought for the filling of Oak street and changing its grade and filling it between Huron and Superior—questions that will be settled when that question is brought up. Then he proceeds to say:

“Now you would have the right to give her such compensation as will leave her property in just as good condition as it was before; whether she made the improvements necessary, or you by your verdict compel the city to do it. She could not insist that this street was now so changed that she must be enabled to put a brick block on it; to use the language of plaintiff, who testifies “there will always be dampness down here, and my house will be a less desirable place than it was; you must give me the value of a brick building.”

That is what the plaintiff below had testified to on the trial.

“Perhaps not just that; but she must be made whole and be left in just as good condition as before the city undertook to do even a lawful act in an improper manner. Because the city might have provided drainage for Oak street even while it was improving Huron and Superior. If it didn't, and that causes the injury, that is the damage for which she has a right to claim compensation.”

Finally he says:

“Of course, there has been conflicting testimony on some points. That you will have to reconcile. That is entirely left with you. You are the judges of the testimony. From all the testimony, not from what you may guess, from what you think possibly somebody might have done; but you are simply from the testimony of the witnesses before you to declare what is the injury to her by reason of being deprived of her lot, of the necessary drainage, and the accumulation of stagnant water, if any, on her lot. We think we have very nearly said all that is necessary.”

Now, the question submitted there is too broad. We think

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the true rule of evidence to be offered is the difference in the value of the use of her property for the period of four years prior to the commencement of this action. Testimony was given here tending to show that the rental value of the house had depreciated in a certain amount of money. That was proper evidence to go to the jury, and it was a proper rule for them to take in arriving at the estimate of damages. The injury to her health was confined to a period of four years prior to the commencement of the suit. That was proper.

Now here is another question, and there was an eighth charge prayed:

"8. Plaintiff was bound to use all reasonable care to avoid damage."

We think the court should have submitted to the jury some charge upon that question. We understand he declined to charge upon that point of law. It seems to us that while she would have a cause of action for the water that is turned in upon her, but still, the well established rule of law is that she should use reasonable care to protect herself, to lessen if she could do so, and there was a way to do so, the damages which she was liable to suffer by the continuation of these causes of action. The question to be submitted to the jury, of course, is: Whether there was any known or reasonable way whereby she could have lessened that injury under her power and control. The testimony shows that the catch basins had been raised at the corners, and that there was a sewer in the street, and it might be a question whether she would have any right to tap that sewer or connect into it, and these were matters which should have been submitted to the jury, and which were open for evidence upon the trial of the case. We do not intend to assume that there were any steps that she could have taken to lessen the damages or reduce the injury which she received; but, whether there was or not, it should have been submitted to the jury under proper care and limitations.

We think this woman has suffered great injury at the hands of the city. We regret being compelled to reverse this judgment; but we think, there has occurred in the charge of the court error which has operated to the material and manifest injury of the plaintiff in error, and that for that reason the judgment should be reversed and the verdict set aside and the case remanded for a new trial.

There is another matter in regard to the eighth request to the jury, and that is whether she should have remained there if her health was being so seriously impaired or in-

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jured, or whether she should have left, and that matters should be submitted to the jury under proper instructions, and testimony submitted to say whether or not she should have left, and might have left; all those are matters which should have gone properly to the jury.

This matter of Oak street—it would seem that Oak street had been made a dumping ground by somebody, and that earth has been put in there, and it is objected to, and the court are asked to charge that as to the water that is turned in from that street, as to the most of it upon the lot, there can be no recovery. Now the court has practically said that the council might have taken steps for the proper drainage between these two points. The testimony shows that there was drainage before this filling was done, and the city is bound to keep in repair these streets, and we are of the opinion that if any unauthorized persons filled the street the city would be liable. That thing of itself was not made a ground of action other than as to the surface water as it then stood, and it would perhaps be sufficient to try the case as upon the condition of affairs at the time the petition was filed—at the corner of Huron and Oak street.

Great care should be taken in trying this case to distinguish between those injuries which were permanent and those which were or might be sued upon and recovered from the filling of Oak street.

We have spent a good deal of time over this case, and we can very well see that the court might have dropped into the use of this language inadvertently, not having sufficient time to examine the authorities prior to charging the jury. We think the law is clear as to what her rights are, but another thing is to keep strictly within the limits of them.

C. F. Watts, City Solicitor, and W. H. A. Read, for City.  
L. W. Morris, for Mrs. Lewis.

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(Fifth Circuit—Stark Co., O., Circuit Court—1895.)

Before Jenner, Pomerene and Adams, JJ.

THE CITY OF ALLIANCE v. GERTRUDE CAMPBELL.

*Injury from defect in sidewalk—Notice to city—Defect in original construction—*

- (1). In an action for damages for injury suffered from a defect in the sidewalk, the city is not entitled to notice of such defect where the same was one in the original construction of the walk; but if it was not a defect in the original construction, then the city is entitled to actual notice, unless by reason of the publicity and the long continuance of this defect in the walk, and this is a question to be submitted to the jury.



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*Same—When notice to city required to entitle recovery of damages.*

- (2). Where the defect is of a nature that it would not be apparent to a passer-by unless he happened to step on it, and it is not a defect in the original construction, the city would not be bound to take notice of it, unless an accident of a character to bring knowledge home to the municipality, occurred before the accident, in question in the case at bar, or so many accidents of some character had occurred there as to bring home notice to the municipality.

*Same—Occupation of plaintiff as element to measure damages—*

- (3). In an action for damages for an injury suffered by the fault of another, it is proper to show who the plaintiff is and what his business is, as an element to determine the measure of damages suffered.

*Plank sidewalk—Duty to frequently inspect—*

- (4). A plank sidewalk will only last for a few years, and it is the duty of the municipal officers to exercise proper supervision and make proper examination of the same by going over it and testing it to discover defects.

*Sidewalk laid by abutting owner—Liability of city—*

- (5). The city is responsible for the defective condition of a sidewalk constructed by the owner of abutting property—in this case the board of education—by order of the city.

(Affirmed by Supreme Court, without report, 53 Ohio St., 650; 38 Bull., 343.)

JENNER, J.

The case of the City of Alliance v. Gertrude F. Campbell, is an action brought in the court of common pleas by the defendant in error against the city of Alliance to recover for an alleged negligence of the city in the original construction, or in the negligent maintenance of a board walk or pavement on a certain street in that city, called Broadway.

The amended petition avers that this injury occurred on the 26th day of June, 1886, and it is charged that the defective sidewalk is upon the south side of this street, called Broadway, and in front of what is known as the Broadway street school house, near the corner of said Broadway and Park streets.

It is further averred that the defendant carelessly and negligently and improperly constructed said sidewalk, in this that the boards thereon were too short to reach onto the stringers to be properly nailed and securely fastened on said stringers; and by reason of said sidewalk being so carelessly, negligently and improperly constructed, the boards thereon had become loose, and were not resting upon or fastened to said stringers, and said sidewalk had become or was at said time, unsafe and dangerous. Said defendant had knowingly and carelessly and negligently allowed said sidewalk so to remain for a long time prior to June 26, 1886.

I read this for the reason that at a former term we reviewed this case on substantially the same facts; but the



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original petition omitted this averment that I have read. The negligence charged merely was in permitting this board walk to be cut of repair and in a dangerous condition, and with the knowledge of the city, and the plaintiff while exercising ordinary care in passing along that walk, received this injury.'

As I have suggested, we had the case at a former term for review, and we find here now an answer to the original petition, but we do not find the answer to the amended petition, but will assume from looking into the record, that the answer was substantially the same as the one to the original petition, putting in issue all of the averments of this amended petition, all of the substantial averments.

The facts, very briefly stated, were, that this woman of middle age, or past, living in the city of Alliance, and in the evening of the day while passing along this sidewalk in company with her two daughters and others, at this point stepped upon one of the planks, and it went down, as she avers, four or five inches, by reason of which she was thrown upon her back, and received the injuries complained of.

It further is shown by her testimony, and the testimony of her two daughters, that they went back, noticed the plank, pushed it down to see the cause of the fall, and they say it was too short; they vary somewhat as to their statement—some of them say two or three inches—didn't reach the other plank within two or three inches; but they all say they stepped upon it, it would pass the stringer and go down four or five inches, and that it was nailed, but the nails were not able to be fastened by driving them straight down, but were driven obliquely, some of the witnesses say they were "toed in," so as to catch the stringer. And it is claimed that that was a defect in the original construction of this walk, by reason of which this injury resulted. It is further claimed that this condition was allowed to remain for so long a time from the original construction of the walk, extending over a period of perhaps nine years, that whether the defect was one of original construction or not, having continued so long, and with the knowledge of certain people (and one woman having said that she was injured stepping into this; her heel was turned, and her ankle sprained, probably), that at all events the character of the defect, and its long continuance brought home knowledge on the part of the municipality. That is the claim.

Now, the testimony on behalf of the city is quite uniform, that they had passed over this walk; I ought to say first

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that it is claimed, and not denied, not seriously denied, and might be accepted as a fact, that this board walk was put down by the board of education in front of their property, school property, and that is urged here in argument, and an authority cited bearing upon the question that this construction, this laying of this plank walk at that place by the board of education, that a defect in the original construction could not be held to apply to the city of Alliance, and therefore that they were entitled to notice. And it is just as well settled now in the authorities, and I might say, that even if I do not refer to all these that I have piled up here, it is just as well settled, at least in our state, and many states, while there is some conflict in others, it is just as well settled that a defect in the original construction of a roadway or a pavement or a board walk, if constructed by a municipality, such substantial defect as to cause an injury to any person who has the right to use it, that they cannot insist upon notice. They are presumed to know what they do themselves. That is the reason for it. It would be absurd to say that if a man builds a thing, constructs a walk himself, to say to him "well, I notify you now that that is built so and so." He is supposed to know, and supposed also, where it is to be used by the public, to build it so it can be used with reasonable safety; a walk that is suitable for the purpose for which it was to be used, for passengers, persons passing over it using ordinary care, that they would not receive any injury by reason of its condition. That is the law, as we understand it. While counsel have been very industrious, in citing numerous authorities, it is a subject upon which the books can be piled up, in which the text books cite authorities by the page, and in which some states hold one way as to what constitutes liability, and some another. So if a case is to be understood to be authority in Ohio, it is very important to know just what their statute is in the state where the supreme court has announced an opinion, and what rule they hold to with reference to the duty of a municipality. It is not for this court to do more than ascertain what the decisions of our own supreme court are, if they have passed upon these questions.

Now, to come back to the facts—the facts shown here by Mr. Johnson, and a number of other parties it is not necessary to name, that this walk had been used right along; they had gone over it, and gone over it with reference to making an examination, and they testify pretty uniformly, and perhaps all of them, that the walk was in good condition. And I suppose, looking to this record, I might say

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it was, except the defect here in question, and there is no doubt of that defect. We must come back to that, and admit that proposition. And if they passed over it a hundred times, that defect was there at the time of the accident, and prior to that; and it was a defect of a character that by passing over it, it would not be apparent to a passer-by unless they happened to step on it. That is true, as a fact.

Now, that being so, the mere fact of it being in that condition, if it was not a defect in the original construction, unless an accident of a character to bring knowledge home to the municipality, occurred before this alleged accident, or so many accidents of some character had occurred there as to bring home notice to the municipality, they would not be bound to take notice of it.

That is, in other words, the municipality is bound to know (whether they did or not), they are bound to know what the citizens generally knew about the walk; they are not bound to know what one or two or three may have known.

There is a good deal of testimony on the question, a good deal as to the character of the injury, and we may say we can see how sensitive counsel naturally got; it is a class of cases that if there is an attempt to deceive it can be pretty easily done; and yet it does not do to assume that; it does not do for a trial court nor for the reviewing court to assume that anybody is attempting to deceive a court and jury. The presumption is, and ought to be, that every witness under oath is honest. They most all are—it is the exception where a witness is not. Therefore, the presumption as to the honesty of all these witnesses ought to obtain.

I want briefly to refer to a few of the authorities; as I have said, there have been a great many cited by counsel—we have looked into a number of them, not all. "Each case depends upon the particular facts of that case, and if it is a proper case to go to a jury, then the jury must determine the question."

Take this Illinois case, among those cited by counsel, 84th Illinois, the case of the City of Chicago v. Margaret Murphy; the syllabus is brief, I will read it: "Liability for injury from defects in a sidewalk, where the evidence fails to show the city authorities had notice that a plank in the sidewalk was loose, which caused a personal injury, or such circumstances as that they, in the exercise of reasonable diligence should have known it was loose, the city will not be liable to the person injured." That is the rule. It is the rule stated in a dozen cases, and more. If it is loose, if it becomes broken on a given day and remains so for a length of

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time, then the authorities must have either actual notice, or it must be of a character or continued for a length of time that the law will presume that they did have notice.

Now, the case of *Blapsberg v. The City of Des Moines*, 63d Iowa, page 523: "Where the evidence showed that persons passing along the street failed to observe that the street was in bad condition, it cannot be assumed that the city officials, by the exercise of ordinary diligence, would have noticed what no other person did." That particularly applies to this case; here hundreds of people pass along this street, and as the record would seem to show, it was a public thoroughfare, and while two or three, or four or five observed this defect, observed it by reason of stepping upon it, or being with the parties who did step upon it; others, hundreds passed along it and did not see it. Now, if it was a defect simply that occurred after this was constructed, or if the city council could not be charged with notice as to the original construction, that case is applicable; as also the case in 2d Denio, page 483.

This is the case of *The City of New York v. Bailey et al.*: "A municipal corporation is responsible for the negligence and unskillfulness of its agents and servants when employed in the construction of a work for the benefit of the city or town, subject to the government of such corporation. The owner of real estate is responsible for the negligent acts of persons employed in making erections upon it for his benefit, though the relation of master and servant does not exist between such owner and the person so employed."

The case in 4th Grey, touches upon another feature of the case that is urged by counsel; that is this—and while I am upon this subject, as I can do it quicker, and do not want to take up too much time—it is claimed here that evidence was offered in the record of this character—the woman was inquired of as to her occupation; she said she had been a school teacher, and then further as to what compensation she received, she said thirty-five dollars a month; and it is said that that was erroneous, for the reason that there was no averment in the petition as to special damages, and this was evidence tending to show special damages. That is the ground upon which this is urged, and this case sustains that view, this 4th Grey, 333, case of *Baldwin v. The Railroad Company*. "In an action brought by a traveler on a highway against a railroad corporation to recover damages for a personal injury occasioned by their locomotive engine, the plaintiff's occupation and means of earning support are not admissible in evidence to increase the damages, if not especially averred in the declaration."

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If that is the law in Ohio, then there never is a case brought when the rule is not violated. If you cannot inquire of a man, when you put him on the stand, "what is your business?"—if you cannot do that, and he cannot say "I am a merchant" or "I am a farmer," in a damage suit, then I say, every time a case is tried, it is violated. And it is very important for a court and jury to know who a man is; and a statement of the proposition would show that this cannot be the law in the broad terms in which it is put here; no doubt whatever that a man laboring on the street and earning a dollar a day, who receives a permanent injury, is not entitled to the same compensation as a man who is engaged in some large business, or a farmer owning a large farm, or a lawyer engaged in a large practice, who receives a permanent injury. The statement of the proposition and the fact shows that cannot be so, and we do not think this authority means that. "The plaintiff's occupation was not stated in the writ, the only averment in the declaration was that the defendants owned the railroad between Worcester and Springfield; the plaintiff was traveling on the highway which crosses said railroad, and was using due care; the defendants ran their engine against his wagon," etc. Now, they hold and assume that under their statute, and the fact that it was not stated in the writ—the occupation was not stated in the writ; they seem to be required to do that under the statute there; then they say the rule is as stated here. But Sedgwick, also cited by counsel, does not mean that. The first volume of Sedgwick on Damages, page 768: "Under a general allegation of damages, the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of, or those damages which the law implies will proceed from it." But how can you tell what damages the man suffers, without knowing who the man is? What is his business? Is he totally disabled from carrying on his business?—if he is, then the damages may be large. The injury may be just as great to a man engaged in a certain occupation or a certain kind of business, he may be still able to carry that on, and the damages would not be so great.

Now, there is one other authority I will read a line or two from; it is in the Atlantic Reporter, October 4, 1898, page 198, case of Lohr and Wife v. The Burrough of Pittsburgh; it is a Pennsylvania case, and a late case: "Notice of the defect cannot be brought home to the defendant by evidence

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that the person who was a Burgess at the time of the accident, had, before he was elected Burgess, called the attention of the chief of police to the defect." A sidewalk such as that in question here, would last only a few years, and it was the duty of the borough officers to exercise proper supervision and make proper examination of this pavement by going upon it and testing it, to discover by the eye.

I will also refer to the case reported in the advance sheets of the New York Supplement for '89, on page 484, *Stebbins v. The Village of Oneida*: "The fact that a sidewalk was inspected by a village official a few weeks before plaintiff received an injury thereon is no defense to an action for such injury, and it is proper to submit to the jury the question whether the trustee was reasonably diligent in discovering whether the walk was out of repair or not. The evidence of the condition of the sidewalk where plaintiff was injured, and of similar accidents occurring there, is admissible to show notice on the part of the defendant." Judge Dillon lays down the rule as we have stated it; that is this—that if it is a defect in the original construction, they are entitled to no notice: if it is a defect that occurred after it was constructed they are entitled to notice, or it must be of a character or continued for such length of time that notice is presumed.

Is the city in this instance chargeable with the original construction of this walk? That is a matter involved in some doubt. It is involved in some doubt for this reason—that the walk was put down by the board of education. But suppose it was a property owner who put down this walk. Can the property owner put down any kind of a walk he chooses? Must not the city be responsible that that walk is constructed there properly, safely? Can a city throw off the responsibility by saying "we didn't put it down. John Doe put it down—the board of education put it down." Must not they superintend it? Must not the civil engineer, or some proper person, have the supervision? If that is conceded, is not the construction, although the actual work is performed by the property owner—is not the construction the work of the city?

We think it must be so held. It seems so to us. It does not seem to us that the responsibility is shifted, because the city supervised this work, or should have supervised it, and should therefore be responsible for its character.

Now, on the former hearing, this case was reversed for the reason, substantially, that the court charged that if they found this was a defect in the original construction that the



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city was not entitled to notice. That is a correct rule of law if the issue had authorized it. The issue did not; there was no averment in the petition charging that it was a defect in the original construction. Under that issue we held that the charge was erroneous, and we held further that the evidence under that issue (and of course we did not mean to make it broader than the issue), that the evidence under that issue did not sustain that verdict, under the charge of the court. That was as far as the court could fairly have gone; they cannot go outside of the issue.

We think the only criticism this charge is subject to, is that it is too favorable to the city.

Counsel did not call our attention to any part of it; but the court fails to charge and refuse to charge although counsel suggested to the court, "We want you to charge, if this injury resulted to this plaintiff by reason of the defect in the original construction, that the city was not entitled to notice," and the court says no, he had charged all he wished to charge on that subject; and he charged that they are still entitled to notice, under the facts as shown in the case.

We think it was only fair to have put that question to the jury; it was for the jury to say "how they found the facts." Was this defect, or was it not, in the original construction? If it was a defect in the original construction, and you so find, then no notice was required. But if you find that it was not a defect in the original construction, then they are entitled to actual notice, unless by reason of the publicity and the long continuance of this defect in the walk. That is what he should have done. He does not do that. He says "they are entitled to notice."

Under the issue and under the charge to the jury, if the jury found from the facts that this was a defect in the original construction they could still fairly say they were not entitled to notice. It is a question for the jury. So we do not find any error in that charge; and we find that the evidence here furnished, under this issue, does sustain the verdict.

Was there error in admitting the testimony of Dr. Phillips? That was one of the grounds upon which we reversed the case before. We held it was clearly wrong. We would have reversed that case on the testimony of Dr. Phillips alone, if there had been no error in the charge; because Dr. Phillips was permitted on the former trial to detail to the jury his conversation with the woman, and it went in corroborating the testimony of the woman. That was prejudicial. We thought so then. We think so now.

We have read that testimony carefully, and we do not

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think there is anything prejudicial in it; indeed we think it was properly admitted, except one doubtful question there—but I will not refer to that further.

We are cited here to Rogers on Expert Testimony, to show that the testimony of Dr. Phillips again is incompetent and prejudicial; he is called again—he examined the woman, and testifies as to how he found her—testifies among other things that he knows of no reason why it should be understood to be a permanent injury, but he details that he talked with her, he wouldn't go there and not talk to the woman; he talked to her, he ascertained what her claim was about it. That he had a right to do.

Now, he testifies and gives his opinion from the examination that he made; does this authority exclude it and hold it to be incompetent? Let us see: "The rule is that an expert cannot be allowed to give his opinion based upon statements made to him by parties out of court, and not under oath. His opinion, to be admissible, must be founded either on his own personal knowledge of the facts, or else upon a hypothetical question; hence the opinion of a physician called in consultation with the attending physician cannot be received, if based upon declarations made to him by such physician, or by the wife or nurse of the patient, as to his symptoms," etc.

But cannot he talk to the party he is examining? The wife cannot state it; the nurse cannot state it; another physician cannot state it—about the symptoms—but cannot he talk to the party, and then making his examination and judging from the examination as to how he finds it, cannot he detail that to the jury? If not, then the testimony of almost every physician would be incompetent, except you put a hypothetical question to him. The hypothetical questions are put generally when the witness has not seen the patient at all, has not made any examination as a physician. Assuming the facts to be so and so, what do you say? But if a surgeon has examined, then a different rule obtains. Of course, you must carefully exclude all declarations from the jury.

Now, this is a large verdict, and it seems to be a hardship on the city; and counsel state well what the rule is in a second trial. When a case has been tried a second time, to a jury, a fair jury, and the verdict is returned substantially the same as on the first trial, it ought to carry more weight to a reviewing court than if it was tried but once. That ought to be the rule; that is the rule, as we understand it, with all courts.



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Metzger & Co. v. Holwick.

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Looking at this whole record we do not find any error that would justify us in again reversing this case. So we affirm it, without penalty.

*Fording & Harris*, for Plaintiff in Error.

*Baldwin & Shields*, for Defendant in Error.

(Affirmed by supreme court, without report, 58 Ohio St., 650; 38 Bulletin, 348.)

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(Fifth Circuit—Stark Co., O., Circuit Court—1895.)

Before Jenner, Pomerene and Adams, JJ.

METZGER & COMPANY v. HOLWICK.

*Right of way—Appurtenant and in gross—*

- (1). Where one granted an estate, and in his deed reserved a right of way across it to a certain point, but made no mention of or reference to any estate to which it was to be appurtenant, or with which to be used, it is a way in gross, and is a personal right which is not the subject of a grant to others, or to inheritance.

*What will constitute right of way in gross—*

- (2). Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming it. The owner of a lot separated by four lots from a right of way, cannot claim the same as appurtenant to his lot; but a covenant in his deed by which the grantor agrees "to leave an open driveway from the south end of said (another) alley along said railway and switch", gives a right of way in gross, and is personal and can not be granted away to others.

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(Affirmed by Supreme Court, 58 Ohio St., 710; 38 Bull., 269.)

Appeal from the Court of Common Pleas of Stark county.  
JENNER, J.

The case of William H. Metzger and Victoria C. Udick v. Daniel S. Holwick, is here on appeal, but the facts are substantially agreed upon.

The plaintiffs aver they are the owners of the real estate described in this petition, parts of two lots in the city of Canton; and they aver they have the free use and enjoyment, in common with others, of a fifteen-foot alley and right of way running through and over said lots, from Cedar street to the railway; further they aver that they are the owners of a right of way—a fifteen-foot alley—running westwardly from the above described alley along the line of the McLain Machine company's railroad switch to Cleveland avenue; and they further aver that the defendant, Holwick, is about to interfere with their use of it by erecting a permanent building across this way.

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The answer admits that he is about to erect this building across this claimed right of way, but it avers that it is his; and that he has a right to erect it there, and that the plaintiffs have no interest whatever in it. That presents the question, substantially.

It is claimed that the plaintiffs had this right of way because it was appurtenant to their real estate. The other side denies that it was an appurtenant; but admits that it was a way in gross attached to certain of this real estate.

Now the facts are these, in brief:—that on the 21st day of December, 1888, the McLain Machine Company was the owner of a tract of land in this city, on a part of which they had erected their shops. They had a switch extending from the Pennsylvania railroad main track to their plant; on the day named they sold and conveyed to Holwick by deed a portion of these grounds; they describe it by metes and bounds, and then set forth that they will construct an alley, fifteen feet wide, from Cedar street clear down to the railroad; and in the deed now to Holwick—and it all turns upon this and what was subsequently done—they provide that Holwick shall have the joint use of this private switch; that he shall pay half the expense of keeping it in good order, and then comes this language: "Said second party agrees to leave an open driveway from the south end of said alley along said railway and switch to Poplar street." That appears in the deed. I ought to say that the same reservation, we assume from what counsel have said, appears in the two prior conveyances until they come to these plaintiffs, and in the plaintiffs' deeds it appears in the language of this deed.

Plaintiffs' property is separated from the defendant's by this fifteen-foot alley, and it fronts on South Market street, and it lies lengthwise on Cedar street; there are four other lots between their property and this switch.

It must be borne in mind that after this conveyance to Holwick, which was December 1, 1888, there were certain conveyances and then the machine company conveys to Heirscheimer January 28, 1892, this lot that the plaintiffs now own. November 10, 1892, Heirscheimer conveys to these plaintiffs whatever rights Heirscheimer had, and it is claimed these plaintiffs had to use this as a way appurtenant to his property.

We think this presents a question of some difficulty, and we find that we are not able to agree among ourselves as to this question; and I want to state the conclusions of a majority of the court.

It is quite important, we think, to understand these facts:

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that these plaintiffs' property is separated by a fifteen foot alley, and lies away up on Cedar street, fronting on South Market, with four lots between it and this right of way; and that at the time the sale was made to Holwick, the machine company owned the land immediately south of Holwick—the switch divided it in two: they also owned the land west on which their shop was situated; now, subsequently, they divided up the land lying west of the fifteen-foot alley which they agreed to open up and did open up—they divided it into lots, and sold them.

It is important to get at a clear definition, we think, of some of these terms, and I want (for fear I may overlook it) to call attention to this 110 Illinois, the case of Keekin v. Votz. Commencing on page 264, it is said the court below determined the case substantially, on this authority, and the facts are these in this case—I can state it so as to make myself understood clearly, I think. A man by the name of Chanler owned a piece of land in Chicago, and it was substantially ninety feet square, eighty-nine feet one way and ninety the other; it fronted on Wells street, and it lay side-wise on Chicago avenue. Now he sold off, I will say (by treating the top here as though it were north I can make myself understood, and there is a diagram of the lots here in this book), he sold off two pieces at the south end of the property, twenty-nine feet to Volz, and another twenty feet to Volz which was afterwards conveyed to other parties by mean conveyances. Now in the deed he reserves ten feet for an alley along and across these lots, across the end of the lots, and it is said that if they can look beyond the deeds (and some authorities differ as to whether they can look beyond the deeds to determine whether or not a way is appurtenant or not)—it ought to be determined by the reading of the deed itself; but still the authorities, or some of them, seem to hold that you may look beyond and find out just how the parties are situated. That is what he had done; he subsequently sold and conveyed the northern lots to other parties, the persons on the south reconveyed, and then they closed up that alley, and the question was made as to whether or not that was appurtenant. It is said here in the opinion of the court that it was necessary, to get to Chicago avenue, to pass over this ten feet. Now, here is what the court said in the opinion—this is the language of the reservation 'excepting and reserving therefrom'—that is the language—'ten feet across the west end of said premises for an alley—(it was reserving that, it was not conveyed); the deeds conveying to each of these parties contain the same

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exception and reservation contained in the deed to O'Neil.' Quoting from another case the court on page 269 say: "In construing deeds or other writings, courts must seek to ascertain and give effect to the intention of the parties. For that purpose, they may and will take notice of attendant circumstances, and by them determine the intention of the parties, the situation and location of the property, the manner in which it was used in connection with the reservation; the exception contained in all the deeds from Chanler clearly indicates an intention to create the alley for a right of way in the nature of an easement."

It run right across the end; they had no way out to Chicago avenue except by that way which had been reserved; they say that being so, it was a way appurtenant. This judge quotes from 11th Grey, page 270: "When it appears by a fair interpretation of the words of a grant that it was the intention of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and the original forming with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee."

That is all I need to say as to that authority. I want to get clearly the definition, and I turn to this recognized authority, Washburne on Easements and Servitudes, and on page 11, first: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable or inheritable, nor can it be made so by any terms in the grant any more than a collateral and independent covenant can be made to run with land."

"Where one granted an estate, and in his deed, reserved a right of way across it to a certain point, but made no mention of or reference to any estate to which it was to be appurtenant, or with which used, it was held to be a way in gross, and not the subject of a grant."

That is the condition in this deed; there is nothing said about the machine company having any other land; it does not refer to it, nor describe it; but just says in so many words, that he agrees to keep a way open fifteen feet wide, and does not say where, does not say for whose benefit. "A right in gross is not assignable. If one has a right of way appendant or appurtenant to an estate, he cannot grant it separate and distinct from the land to which it belongs. When, therefore, the grantee conveyed the dominant estate with all its ways, etc., it did not convey any right of way as being appurtenant under that grant except such as was con-

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connected with the use and enjoyment of the land to which it was annexed."

It must be remembered that the switch was a private switch, and so called in this deed. Holwick agrees to pay one-half of the expense of keeping it in order. And after that, this other lot, away off, four lots at least distant, is sold to the plaintiffs.

I want to turn over a few pages and see what this authority says as to when a way is appurtenant, and I will read a line: "Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming it." Now, if that is a correct definition, there is no claim that there is one terminus of this way on this land; it terminates in an alley near the railroad, and this lot is at the upper end of the alley, fronting on Market street and Cedar street; so it is not in any way connected with it. It does not terminate there any more than any other street that might be followed up with alleys and streets, would terminate there. "Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming it." They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. They are of the nature of covenants running with the land, and like them must respect the thing granted or demised, and must concern the land or estate conveyed. A way appendant cannot be turned into one in gross, because it is inseparably united to the land on which it is incident. So a way in gross cannot be granted over to another, because of its being attached to the person; nor can one have a private way over and along a public highway.

Now, I desire to call attention to 23d Ohio State, the case of Boatman and Wife against Lasley, page 614; the syllabus is very brief: "A right of way in gross is a right personal to the grantee, and cannot be made assignable or inheritable by any words in the deed by which it was granted."

Here are some of the facts: A right of way had been granted by deed, on the 7th day of June, 1869, by the warrantor to Logue, his heirs and assigns, and the tenants and occupiers for the time being of the lands then owned and occupied by the said Alexander Logue, in section 15, town 5, of range 14, in the Ohio company's purchase etc. It is not alleged, however, that Logue at the time the right of way over the warranted premises was granted to him by the plaintiff, was the owner or occupier of any land in said section 15, or elsewhere; nor is it alleged that the right of way complained of

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became appendant or appurtenant to any land whatever, or that said Roush had any interest in said right of way.

The evidence being closed, the court charged the jury as follows, on the questions raised on the issue: "If the jury shall find from the evidence that at the date of the deed made by Lasley to Logue, marked 'A,' the said Alexander Logue, grantee therein, was not the owner in fee or otherwise of some real estate adjoining the farm through which said right of way is granted, or situate in the neighborhood so that said right of way may become appurtenant to the same, then the said deed conveys a right of way personal to himself alone, and one which cannot descend to his heirs, one which he cannot assign or release to another person except such other person be the owner of the farm through which said way was granted."

Now, if this reservation to the McLain Machine Company was personal to the McLain Machine Company, they could not by conveying a lot away off distant from that, not touching it, not coming near to it, make it appurtenant. That seems to be the point of that charge.

Judge McIlvaine, announcing the opinion, among other things, says this: "The terms of the deed from Lasley to Logue plainly import an intention to make the right of way therein granted appendant and appurtenant to other lands, but the record does not disclose either the facts or the law given to the jury whereby it could determine whether or not that intention was accomplished.

"Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant."

This case in the 100 Pennsylvania State is also cited, page 42. I may refer to it briefly, and I will simply read a line from the opinion of the court on page 46: "The extent of the right, and everything pertaining to it, is to be gathered from the terms of the grant in Hunter's deed." Now, if that is the law that you have to look to the deed for the extent of it, referring to it we find the grant was the free use and privilege of an open road, forever. If there was any doubt as to the nature or extent of the grant, the well settled rule would require to be taken most strongly against the grantor;

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but there is no ambiguity about it. On the contrary, it is clear and explicit, and instead of restricting or in any way limiting the use, it is declared to be free and an open road forever. It needs no citation of authorities to show that such a right of way may be used and enjoyed by those who own or lawfully occupy any part of the dominant tenement for any purpose to which it may from time to time be legitimately applied. Only those who may be properly regarded as trespassers on the dominant tenement can be excluded.

I cite that to show that there they hold you cannot look beyond a deed for the purpose of determining the question.

And in the Massachusetts report, 107, case of *Dennis v. Wilson*, page 591: "The owner of a lot of land adjoining the highway sold and conveyed part of it, excepting and reserving a right of way extending from the highway along the line of division between the part sold and the rest of the land for a distance less than the whole depth of the lot.

"Held: That the right was appurtenant to the rest of the land, whether or not it was limited to the grantor's life." This is what the court say among other things: "When there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relations. The right of way excepted and reserved extended from the highway in front and along the line of the division for a specified distance, less than the whole depth of the lots, etc."—without reading more there. "Its character must be determined by the purposes for which the way was intended to be used. Whether a way is appurtenant to land depends upon its relation to the land in respect of use, and not upon any correspondence with the title of the owner in respect to duration."

Now, how is this in fact. This party could not use that switch; the switch is on the private land of Holwick, and the private land of the machine company. Here is a way all around it. Here are two streets; this lot is on two streets; it abuts on this alley. It does not terminate at this lot, nor in this lot. And taking the facts of this case, with these authorities, the definition they give as to what would make it appurtenant, the majority of the court think that this way was merely a way in gross, reserved by the McLain Machine Company for their benefit, and when they conveyed other real estate they had, different from that, not connected with it, why, they could not convey that reservation. So we will have to dismiss this petition, at the costs of the plaintiff.



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POMERENE, J.

I am wholly unable to agree with my brothers on the subject on this point; I think it is connected with the part of the land retained.

Now, this machine company owned a certain tract of land; part of it lies between Poplar street and South Market street, and part of it still west of Poplar street. In selling portions of that off the west part, that which lies between Poplar street and South Market street—a part of that consideration on the part of the machine company was that they agreed to leave an alley open on the west part of that land which they retained; Holwick agrees to pay so much money, and agrees to leave a driveway open to that alley, to connect that part of the land, and it seems to me it is part of it. That is the point in which I disagree with my brothers.

*N. C. McLean, and C. T. Meyer, for Plaintiff in Error.*

*Wann & Bow, for Defendant in Error.*

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1898.)

Before King, Haynes and Parker, JJ.

ALFRED C. NEEL v. MARIA L. MCCREERY.

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*Lease—Agreed upon by correspondence—Indefiniteness—*

- (1) Where a party holds a lease on premises for five years with the privilege of five years more. "at the same rate," and, while holding the premises for the five additional years, he offers to take the premises for ten years more, at the same rates, which offer is accepted by the lessor, the parties by the word "rates" clearly meant the same terms and conditions as in the former lease, and the terms and conditions in the new lease are not so indefinite as to make the agreement for the new lease for ten years too indefinite to be enforced by the court.

*Contract for lease—No damages for failure to execute where possession is given—*

- (2). Where the lessee is given possession of the premises, he is not entitled to damages from the lessor for failure to execute a lease for the term agreed upon between the parties.

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KING, J.

This action comes into this court by appeal. Suit was brought in the court of common pleas to compel the defendant to execute to the plaintiff a lease upon certain premises under an agreement, as alleged in the petition—a contract. The allegation in the petition is denied in the answer. It is contended, also, that she never agreed to make a lease, but that, in addition to this, if such an agreement could be



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found from the evidence, that it is within the statute of frauds and could not be enforced, because not in writing; or if in writing, it is not definite and certain.

The contract in the case, if there is one, is a contract made by correspondence.

In August, 1887, the plaintiff and his then partner, leased of the defendant one story of the premises in question, by a written lease that was duly executed by the parties, left for record September 6, 1887, and duly recorded. By this lease the defendant rents the first floor to the plaintiff and his partner for a term of five years, commencing on the first day of October, 1887, and ending October 1, 1892, for the sum of \$1,500 a year, to be paid in equal installments of \$125, on the first day of every month, and containing a provision in these words: "With the privilege of five years more at the same rates." Plaintiff, during the term, seems to have succeeded to the business and interest of his partner in the lease, and, at the end of five years, he elected to take it five years more, and after that period had partially elapsed, and while he was in possession of the premises and carrying on the business of manufacturing and selling trunks therein, he began the correspondence which is introduced in evidence in this case, with a view of securing this place of business after the expiration of his term October 1, 1897. This correspondence began on the twenty-eighth of December, 1893 and I refer to an extract from it, which we conclude has some bearing upon the question whether there was a contract. On the twenty-eighth of December, 1893, the plaintiff wrote to the defendant, and among other things said to her this:

"My time here runs something more than three years yet, but I will not want to wait until the time is up before knowing what I am to do. If you are willing to extend the time for ten years longer from the expiration of the present lease at the same rates, please let me know at once, and I will soon decide between that and another prospect I have. We might make terms on the whole building, and save you the annoyance such as you have had with some upstairs tenants."

On January 5, 1894, the defendant wrote to the plaintiff the following in regard to that proposition:

"In regard to your proposal, or plan to take the whole building, 817 Summit street, I would be pleased with the idea if you think you can pay me my price. I have had an offer of the same sort at \$2,000, and did not encourage the party, because you held the lease. It was a great tempta-

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tion, and only \$100 more than I have been and am now getting. If you will agree to these terms, I would prefer you should have it."

A fire occurred which damaged this property in some respects, and interrupted the correspondence to some extent; but on February 5th the defendant wrote to the plaintiff inquiring why she didn't hear from him about the lease, and making some other inquiries. On February 7th, and before he had received that letter, he wrote her another, devoted principally to a proposition upon his part to lease the ground upon which this building stood, for some long term of years, and argued that it would be beneficial to both parties, and under such a lease he would put up a new building. But having received her letter of the 27th, on March 1, he addressed another to her, in which he says this:

"Now about renewing the lease after my present one expires. (I want to make it plain to you), I received your letter of January 5, '94, containing your proposition of \$2,000 for the entire building on another ten year lease. I want to say I will take it on those terms, unless we can mutually agree on the other plan which I suggested in my last letter yesterday."

Then he goes on to repeat it. On March 6, she wrote him a letter, in answer to this one to which I have referred, and perhaps the one preceding, in which she dismisses entirely his proposition to lease the ground, but suggested to him that he take a five year lease of the whole property, beginning the following April, which would be three years and six months before the expiration of his then existing lease. March 13, 1894, he replies to this letter in a long and somewhat rambling letter, but says in the course of it the following:

"In conclusion I will say that my letter to you of December 28, 1893, asked for terms on an extension of ten years after the present lease expires. Your answer of January 5, '94, made the proposition of \$2,000 per year for the whole building. I have already written you accepting it on those terms. If in the future you wish to consider the other plan, it can be discussed at any time."

That would have been a very good place to stop with the correspondence, but it kept on. She follows with two other letters in which she makes two other propositions, which I need not stop to refer to. April 6, 1894, he undertakes to answer these, and in the course of the answer says:

"I don't see that I need say anything more about leases. As I have repeatedly said. you in your letter last January,

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made your proposal to lease me the whole building at \$2,000 per year, for another ten years after my present lease on this room expires. I have accepted that offer, which I consider binding on myself as well as you. I am disposed to do exactly as I agreed to do, and consider myself bound here till October, 1907."

Then he follows with matters not relevant to the question I am discussing, and then says:

"If it will settle the matter, though, I will take third floor off your hands at \$100 per year, beginning May 1, and run to October 1, 1897; and from then, you have agreed to lease me the whole building at \$2,000 per year for ten years."

May 2, 1894, she replies to this letter, with some causes for delay. She says as follows:

"I think I understand what you want to do and what you want me to do. You are willing, you say, to take my offer of paying me \$2,000 for the whole building, but not willing to commence doing so until the present lease expires. I wrote you requiring you to grant me a new lease, taking the whole building at those terms, commencing the first of May, 1894. I thought you would be willing to do this after you knew you were keeping me from making \$2,000 on the store alone. For you can readily see had my store been empty this spring, I would have gotten \$2,408. But as you are willing to pay the \$100 per year on the third story, commencing May 1, 1894, I accept your offer. This is as fair as I can expect or wish."

There is much more in that letter, and there are many more letters running over the period between May, 1894, and October, 1897. Out of them all we extract no agreement to rescind or set aside any previously made agreement, but upon the defendant's part there was a continual series of different propositions, all of which were substantially ignored, by the plaintiff insisting that he had made his agreement, and insisting that she should execute the lease in pursuance of that, and mailing to her at different times forms of leases that he had drawn up, which she neglected, and finally refused to sign or execute. His time in the lower store expired, and he began on his new term. There was no notice to quit at the expiration of his ten years. He continued doing business on the first floor, and more than that, she gave orders to all her tenants in writing to pay their rents to the plaintiff for their future leases after October 1, 1897, but refused to make any written lease to the plaintiff.

He also began and continued the payment of \$100 per

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year for the third floor from May 1, 1894, to October 1, 1897, which she received and kept.

We think it fairly appears from this correspondence that this defendant agreed to lease this property to the plaintiff, in writing, for ten years, commencing on the first day of October, 1897, the rent and the other conditions thereof to be as in former lease. The basis of all this correspondence is the proposition of the plaintiff that he would make only that kind of a lease, upon the same rates as contained in his present existing lease.

It is said that the word "rates" does not apply to the terms; but it will be noticed that the parties in the lease which was executed in August, 1887, provided that the term should be five years, but that there should be a renewal for five years longer, at the option of the lessee, upon the same rates. What construction would the court give to that expression? Clearly the parties meant the same terms and conditions. The terms and conditions which are applicable to the present lease are not indefinite at all, nor indeterminate. They are the same, if based upon plaintiff's proposition first made, as in the old lease, excepting so far as those conditions and terms have been by the parties modified. They did modify it; first, as to the term, which, instead of being for five years with the privilege of five more, is for ten absolutely; second, the rental and amount of premises rented, instead of the first story, the three stories of the building are rented, and instead of \$1,500 a year, the amount of rent in the first lease, \$2,000 a year is stipulated for. One provision appears in these letters, and the correspondence indicates, that it was understood by the parties that the lessee should have the privilege of subletting both the floors that he was not occupying with his business. His object in renting it, as he expressed it in his letter to her was, that she might not be bothered with a number of tenants, and might look to him for the rent wholly. Clearly he indicated that he desired to sublet the other two floors. So that condition is made plain from the necessities of the case and the character of the contract that the parties entered into, that he should have the privilege of subletting the second and third floors.

We think it seems clear that the plaintiff should be entitled to specific performance of this contract—that is, it should be decreed that defendant should execute a lease for ten years from the first of October, 1897, at an annual rental of \$2,000 per year, payable in equal installments of \$166.67 on the first day of each month; that he should have

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the privilege of subletting the second floors; and the other terms and conditions, many of them only incidental to the contract, should be the same as in the original lease.

The case was somewhat hurriedly submitted to this court, and after or during the argument it was suggested by the plaintiff that he had evidence that he desired to offer claim-in damages of the defendant for her failure to execute her lease in time. No evidence was submitted. However, we will decide the case as if the plaintiff had proved, or offered to prove, what he claims he should be entitled to prove.

We do not think this is a case for damages. Plaintiff's agreement which we have found to have existed, was certainly made as early as May 6, or within a day or two after that, 1894. It was an agreement that the defendant should execute to him a lease of this property for ten years. Within a reasonable time thereafter, if she failed, or neglected, or refused to execute it, he could have brought his action to compel her. He was not required to wait until possession could have been delivered, or until the lease was to take effect; for the object and purpose, as he says in his correspondence, of making this agreement, was that he might know some time in advance that he was to have the premises. So he might have begun this action long before the first day of October, 1897. But he waited, however, until long after that time, and at that time, as I have stated, the possession of the entire building was turned over to him. It is said now as a reason why he suffered damages that he had no written lease to rely upon, and therefore he could not contract with her tenants to take the other part of the premises that he did not occupy. He had this contract, which either was or was not a contract, good for ten years, or good for a lease for the term of ten years, and if he relied upon it, he could proceed as if he did rely upon it. He could not have suffered any damage by reason of the failure of defendant to execute a lease, since defendant had given to him possession of the entire premises. Had she refused to give him possession, then there would be some ground for his claim that he had been damaged. We see none in this case, but hold that he is not entitled to recover for damages. The entry will be accordingly.

*J. M. & W. F. Brown, for Plaintiff.*

*Scribner & Waite, for Defendant.*

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Gausen et al. v. Moormann.

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(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

GAUSEN et al. v. MOORMANN.

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*Administrator holding over in leased premises—Individual liability—*

An administrator of the deceased assignee of a permanent leasehold containing covenants to pay rents and taxes, who for some time continued to hold possession of the leasehold, is not personally liable for rents and taxes accruing.

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(Affirms same case, 5 Nisi Prius, 254.)

Error to the Court of Common Pleas of Hamilton county.  
SMITH, J.

The plaintiffs in error are the owners of the fee to the property known as the Germania Hotel, which is under a perpetual lease containing covenants to pay rents and taxes, binding upon the lessee, his heirs, executors, administrators and assigns. This lease was assigned to one Wm. Pape, who carried on the hotel business until his death, when he was succeeded in the business by his widow, as administratrix, and subsequently under authority of the probate court by F. J. Moormann, the present defendant, as administrator de bonis non, who carried on the hotel business for a period of seven months, during which time rents accrued to the amount of \$1,225, and \$805 taxes. Suit was brought by the owners of the fee against Moormann as administrator de bonis non, and Moormann individually, the election being subsequently made to proceed against Moormann individually.

The question thus presented was as to the individual liability of the administrator of a deceased assignee of a perpetual leasehold containing covenants to pay rents and taxes.

Judge Hollister's holding, was that there was no personal liability on the part of the defendant to the plaintiffs. This, for the reason that the estate, divested by the statute of its chattel qualities, was no longer an asset in the hands of the administrator. The title was in the heir of the deceased, William Pape, subject to the dower rights of his widow, and from the heir the administrator could not take it except for the sole purpose of selling it in the manner prescribed by law to pay the decedent's debts; and he could take the title for this purpose, not as one having any interest in it, but as a convenient instrument or conduit by whom and through whom the title could be passed from the heir to the purchaser. In this view of the matter the liability to the plain-

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The Ohio Farmers' Insurance Co. v. Burget.

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tiffs for rent and taxes attaches to the dowress and the heir as assignees of the lease by operation of law; and for rents collected by the defendant from portions of the property not used for hotel purposes, he is liable to the heir and dowress, as their agent, or if such agency is disaffirmed by the minor, then as their tenant.

We think that the finding made in this case by Judge Hollister on the facts and the law was correct, and on the ground stated in his opinion submitted to us, the judgment will be affirmed.

*M. F. Galvin and E. P. Bradstreet*, for Plaintiffs in Error.  
*Wm. L. Avery and F. J. Moormann*, contra.

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(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Oct. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

THE OHIO FARMERS' INSURANCE COMPANY v. E. L. BURGET.

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*Fire insurance—Temporary removal of goods to other place—*

- (1). Where goods insured are removed temporarily for some reason from the place where they were insured to another place, and then returned to the place where they were insured, where afterwards they are destroyed by fire, the company is liable for the loss.

*Same—Verbal assent of agent where writing required—Liability—*

- (2). Where the policy provides that the policy shall be void if the goods are removed to another place without the consent, in writing, by the company, and the goods are removed with the verbal consent of the agent, who tells the party to come in afterwards and the policy would be fixed, but the goods are then destroyed before the written consent of the company is endorsed on the policy, the company is liable for the loss, notwithstanding the provision in the policy that its agents are not authorized to waive any of the conditions of the policy.
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MARVIN, J.

The case of the Ohio Farmers' Insurance Co. v. E. L. Burget, is brought here upon a petition in error to the court of common pleas.

The suit was brought in that court by E. L. Burget, to whom the Farmers' Insurance Company had issued a policy of insurance upon certain household goods owned by the plaintiff below. The policy was issued on November 22, 1895. At the time the policy was issued, the goods were in a house at No. 868 Prospect street in the city of Cleveland. Subsequent to the issuing of this policy, it was left un-



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til after the fire occurred by which the property was destroyed, with the agents King & Reed, by whom it was issued.

The assured, in February, 1896, removed to another part of the city, taking these goods to Winchester avenue. Shortly before moving to Winchester avenue, a portion of the goods insured were removed for a few days and kept at a house on Huron street, and thereafter removed on February 4, 1896, to the house on Winchester avenue, and the fire occurred on the night of that day, resulting in the destruction of the property or a part of it, and, because of that state of facts, suit was brought and recovery was had.

It is said that there was error in the trial of the case; error in the overruling a motion for a new trial which was filed.

The errors complained of consist chiefly in that the court allowed a recovery to be had notwithstanding a clause in the policy, which clause reads:

"If the assured is not the sole and unconditional owner of the property; or if any building intended to be insured stands on ground not owned in fee simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change takes place in the title, interest, location or possession of the property (except in case of succession by reason of the death of the assured,) whether by sale, transfer or conveyance in whole or in part, or by legal process of judicial decree, or if this policy be assigned or transferred before loss, this policy shall become void, unless consent in writing is endorsed by the company hereon."

There was no consent in writing on the part of the company, that the location of these goods might be changed.

It is said that by reason of this clause in the policy and the fact that a change of location was made and no written consent entered upon the policy, the policy became void. It is urged that the policy became void immediately upon the removal of the goods from No. 868 Prospect street to Huron street. That, from the evidence, was clearly a temporary removal. The goods were not destroyed while on Huron street. It probably would hardly be claimed, at least it could not, as I think, be successfully maintained that if the goods for some reason had been removed to Huron street for a few days and then returned to No. 868 Prospect street and there destroyed by fire, that the company would not be liable; but the simple removal to Huron street and then tak-



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ing back to the place where they were when the policy was issued, would not invalidate the policy and release the company from liability.

It will be found on examination of the authorities, that where there is a provision in the policy that where the premises insured become vacant the policy will become void, it is only in the case where the fire occurred during the time the property is thus vacant, that the company is relieved from liability.

So far as I have seen, in each case where a recovery has been denied on the ground that the clause in the policy providing that if the premises shall become vacant the policy shall become void, it is where the fire occurred during such vacancy; and the same reason would seem to establish the proposition that it could be only in the case that the property had been destroyed on Huron street, that the liability on the part of the company could be evaded because of such removal to that street.

The plaintiff, Burget, as is testified to both by herself and by Reed, called at the office of King & Reed, the agents from whom this policy was obtained, to whom application was made and who, by the terms of the policy must sign it before it is valid. She represented on the day that she moved to Winchester avenue, to that office, to Mr. Reed, that she would move that day. She says she had expected to move, but said nothing about having her goods stored at Huron street. She says she expected to move unless prevented by reason of storm. In fact, she did move that day. She testifies that Mr. Reed said to her when she said that she was about to move, "Very well, we will take care of you," or "You come in and we'll fix your policy for you." Mr. Reed says she stated that she was about to move, and he said he would have to examine the place and determine what to do, but the jury evidently believed she told what occurred, and that Mr. Reed was mistaken. But it is said that the language of the policy is such, even if that did occur and if Reed gave her to understand by his language that the policy would be continued in force, still he could not waive on behalf of the company this provision in the policy.

Exception is taken to the charge of the court on the right of the agent to waive this provision of the policy and the right to have the change made except it be endorsed in writing. In regard to this matter the court said:

"If this property was destroyed by fire on Winchester avenue, and if this is the same property described in this policy of insurance, and if its removal there was with the

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approval of the agent of this company; that is, if what occurred at the office of this company amounted to an assent of the company to have this property covered by the policy in its new location on Winchester avenue, so that it was in fact covered by this policy, we think that the fact that in the progress of moving it, it was for a day or more kept at some house on Huron street, would not have the effect to prevent recovery in this case, and would not be a material fact in this case, so far as its determination by the jury is concerned."

That was excepted to. What has already been said shows we do not understand that there was any error in this language of the charge.

On the question of the consent to the removal which is complained of, the court said:

"It was the right of this company, to render it liable under this policy, to have endorsed in writing on the policy the consent of the company to a change, before liability would arise under the policy, growing out of a fire occurring and at changed locality. It had the right, I say, to have this in writing; but that if the agent of this company, in substance, informed the plaintiff that she might make this change, and that this endorsement on the policy could be made later, that she might bring the policy in at some time for the purpose of having this endorsement made, that would constitute a waiver on the part of the company to have that endorsement in writing on the policy before the change was made. So that it becomes important then, and becomes a question of fact for your determination, what occurred between the agent of this company and this plaintiff the morning of the day, or the morning she called concerning this removal."

Now it is urged that this was error, because the agent under the terms of this policy could not make such a waiver. We think there was no error in that charge, and that the court was fully justified in what was said by what is said in vol. 11 of the American & English Encyclopedia of Law, (old edition,) 181, and the authorities there cited. Also 18 Wal., 222; 67 Cal., 36; Walsh v. Aetna Life Ins. Co., 30 Iowa, 138; 27 Wis. 693; and especially by the case of Niele v. Germania Life Ins. Co., 26 Iowa, 9.

The condition in this last lease was that if the risk be increased by a change of occupation, etc., (it was a building that was insured), without written consent, the policy should be void. It was held that the agent who had the au-

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thority to issue the policy and take the premium, might waive the provision and a recovery be had.

The fourth clause of the syllabus reads: "A condition in a policy of fire insurance, that if the risk be increased by a change of occupation or other means within the control of the assured without the written consent of the insurers the policy shall be void; being inserted for the benefit of the insurers, they may dispense with a compliance therewith or waive a forfeiture of the policy incurred by a breach thereof, and thereby become estopped from setting up such condition or breach in an action for a loss subsequently occurring."

The fifth clause reads: "And such waiver of the forfeiture arising from the breach of the condition need not be in writing, but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty."

The eighth clause reads: "A local agent of a foreign insurance company, clothed with authority to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risks and change of occupation of buildings insured, to cancel policies on account of increase of risk, and exercise supervision over the property covered by policies issued at his agency, has power to dispense with conditions and waive forfeitures arising from a breach thereof, in the absence of any limitation upon his authority known to the assured."

The ninth clause reads: "The foregoing powers are necessary incidents of the general authority of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution thereof."

These several propositions are thoroughly reasoned out in an elaborate opinion in the case, prepared by Mr. Justice Beck, and his opinion is followed by a very valuable note prepared by John N. Rogers, Esq. Other authorities are to the same effect, and we think fully justify the position that a waiver may be given by the agent so that the company may be bound notwithstanding the clause in this policy.

Another error complained of in this case is that the conditions as to the proofs of loss were not complied with.

The plaintiff testifies that she made out proofs of loss and sent them by mail to the company; the officers of the company testify such proofs were never received.

A witness by the name of Canfield testifies that he prepared proofs of loss for plaintiff and they were sworn to

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State ex rel. McGinnis v. Pike et al.

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ment and order of said district court in said cause, and signed the same as the clerk of said district court, and affixed thereto the seal of said district court, and dated certificate as of the fourth day of April, A. D. 1882, which said copy of said final judgment and order contained therein, amongst other things, the order remanding said cause to said common pleas court for execution, and for further proceedings.

"That thereupon said copy of said final judgment and order, so certified and authenticated as aforesaid, came into the hands of, and was received by the clerk of said court of common pleas on or about the——day of June, A. D. 1887, and thereupon said clerk of the court of common pleas caused the same to be journalized in one of the journals of said court of common pleas, and the same now remains of record in said journal, but there is upon said journal no statement or memorandum, showing the date or time at which said mandate was in fact so journalized.

"That on or about the said——day of June, 1887, when said clerk of said court of common pleas received said copy of said final judgment and order, he falsely endorsed, and file-marked on the back of the same, to the import and effect that said mandate was received and filed in said court of common pleas, on the fourth day of April, A. D. 1882, when in fact the same was received only on said —— day of June, A. D. 1887, and also then and there falsely entered a memorandum which yet remains on the appearance docket, containing memoranda in said cause when the same was pending in said common pleas court, and before the appeal to said district court, to the effect and import that a mandate had been received on the fourth day of April, A. D. 1882, from the clerk of said district court.

"That since said month of June, 1887, and on or about the fourth day of November, A. D. 1887, the relator filed her certain written precept with the clerk of the court of common pleas of Lucas county, Ohio, and in his office, demanding that he issue to the sheriff of Lucas county, Ohio, an order of sale in said cause, directing the sale of said real estate aforesaid, and the application of the proceeds thereof in accordance with said final order and judgment, which precept the said clerk then and there refused, and has ever since refused to obey, or to issue the order of sale thereby demanded.

"That after said clerk had so signified his refusal aforesaid, your relator filed her written motion in said court of common pleas in due form, asking the order of said court upon said clerk, that he issue the order of sale demanded by her

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said precipe, which motion afterward, to-wit, on the fifth day of December, A. D. 1887, came on and was heard by said court, the aforesaid defendants then and there presiding and sitting in said court, and said motion was thereupon, after hearing thereof, by the judgment and order of said court, refused and denied.

"That it was then and there the legal duty of said court, and of the said judges composing the same, to make an order requiring and directing its said clerk to issue forthwith an order of sale to the sheriff of Lucas county, Ohio, directing him to cause said real estate to be duly advertised and sold as upon judgment and execution, and the proceeds applied in accordance with the terms of said final judgment and order of the said district court."

Then it sets out the names of the respective judges of the court, and avers that they are still in office. It further avers that he is without remedy at law.

"Whereupon plaintiff prays that defendants be commanded forthwith to cause to be issued by the clerk of the court of common pleas of Lucas county, Ohio, an order of sale directed to the sheriff of said county, and commanding him to proceed to appraise, advertise and sell according to law said blocks five and seven (describing the property), and for the appropriation of the proceeds of such sale in accordance with said final orders and judgments of said district court, and for other and full relief."

The case was very fully argued at the last term of this court, and there was quite a large citation of authorities. We have endeavored to give to the matter very full consideration.

The questions argued were, among others, very largely upon the effect of not issuing the mandate in any supposed proceedings in the court of common pleas, between April, 1882 and June, 1887—of course there were other questions involved.

It will be perceived that the prayer of this petition is that the court of common pleas be ordered to issue an order of sale upon the record of a judgment of the district court which is said to have been corrected in the court of common pleas. It is averred here that the clerk of the court has falsely entered upon the appearance docket and put a file mark upon the back of a journal entry sent down from the district court that it was filed in 1888, when the fact was that it was filed in 1887. The judgment is of such a nature as that we understand, under the decisions of the supreme court, it does not become dormant, and if the plaintiff was entitled at all to his order of sale, he would be entitled to it as well.

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if it had been filed in 1882 as he would if it was filed in 1887—so far as the life of the judgment is concerned, it is not a dormant judgment. Still the pleader has, for reasons satisfactory to himself, averred that the mandate was not filed until 1887, and that these endorsements have been falsely made, and he avers that since the date of the filing, in 1887, there has been no process issued upon that decree.

In the view that we take of the case, we shall not discuss a good many of the questions that have been raised here. There were some very important questions underlying this proceeding in some form. The question is as to how far the court—this court—may hear evidence for the purpose of showing that the file mark made upon this appearance docket and the file mark made upon the back of the mandate sent down to the court of common pleas is incorrect, is certainly a very important question, and one that there have been some decisions of the supreme court in relation to, as we understand the decisions.

The question also as to what the effect of the non-filing of the mandate in the court of common pleas, or spreading it upon the journal, may have upon the order of sale, in either view, whether issued in 1882 or 1887, is certainly a very important question, and one which we do not propose to dispose of the present time.

The statute with regard to mandamus, sec. 6742, Rev. Stat., provides that the writ can only be issued by the supreme court, or the district court; "and although it may require an inferior tribunal to exercise its judgment, or to proceed to the discharge of any of its functions, it cannot control judicial discretion."

The petition distinctly avers that the relator made motion in the court of common pleas, which was heard by that court, asking that court to cause an order of sale to be issued by the clerk of the court upon this decree or judgment. That motion is based upon a conclusion found in sec. 6707, Rev. Stat., which is:

"Any order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title"

And we suppose this motion is properly described as a summary application in an action after judgment. The clerk of the court had refused to issue upon a precept of the party the final process of the court, and an application was



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made to the court of common pleas to order him to issue the final process—a process without which a judgment would be practically, to her, a nullity. That, the court of common pleas refused to do—for what reason, is not set forth in the relator's petition—and of course need not be, as it is not material here: it is sufficient to know that the court, sitting as a court, on the motion made in this action for the final process of the court to carry into effect the judgment found upon its journal, refused, after hearing, to make such order.

Now the question is—in the first instance, whether or not the party plaintiff here has an adequate remedy at law?

It seems to us beyond question that the party had a right to take a petition in error to this court; and from this court to the supreme court, for the purpose of reviewing the acts of the court of common pleas, and, if that court had erred in its refusal to grant the party a final process, the action of the court would be reversed by the higher court, and this mandate then issued to that court to proceed according to law to carry the judgment into effect according to the decision of the superior tribunal. We are very well acquainted with the opinion that that is the true remedy of a party—that he has an adequate remedy at law, and that this will be in conformity with the mode pointed out by the statute for the review of the action of the court of common pleas, where it is alleged that it has committed an error in the hearing of any matters properly presented before it for its adjudication or judgment or order.

We have been cited to *Hollister v. Judges, etc.*, 8 Ohio St., 201, as one affording authority to this court to make this order. In that case the record disclosed that the cause had been heard in the district court of Lucas county, and, upon final hearing of the case a bill of exceptions had been taken to some proceedings or ruling of the court, which had been signed by the judges of that court and filed with the clerk, and that after that the court had adjourned, and, in the absence of two of the judges of that court, and without consultation with them in any form, one of the judges of the court had erased from the bill of exceptions a material portion thereof; and the prayer of the writ was that the court order the judges to restore to the bill of exceptions that part which had been erased. To that an answer was filed neither affirming nor denying the action of the court, but simply, by way of courtesy to the supreme court, suggesting that since the trial of that case two of the judges who sat in the case had gone out of office and their terms expired; that

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other judges had been elected to succeed them, and that at that time only one of the judges who then composed the court was then holding office. It was further suggested that they were judges of the court of common pleas, and not judges of the district court, and that therefore an order upon them would be invalid, and that they had no authority to do an act required by the supreme court. But the supreme court held that they were judges of the district court; that no matter that others had gone out and others had gone in, that still the judges of the court of common pleas were the judges of the district court, and they were compelled to act upon their own information, or knowledge, or recollection of the facts of the case; that they might give notice to the parties and receive the evidence and make an order upon the parties to the case which would bind them; and thereupon they issued the peremptory order prayed for by the relator in his petition.

It will be perceived in this case that there is no prayer here that the court of common pleas be required to order their clerk to correct the record. The pleader proceeds upon the theory in his allegations that the facts in the case showing that the mandate was not in fact actually filed in the office of the clerk of the common pleas until 1887, that that is sufficient to entitle him to an order for the issuance of the execution.

But the fact still remains, that by the file mark upon the back of the paper, and by the entries in the appearance docket, that the paper was filed in that court in April, 1882.

Section 4958, Rev. Stat., provides as follows:

"The clerk shall enter on the appearance docket, at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case, direct and reverse, in the name of each plaintiff and defendant; he shall also enter, at the time it occurs, under the case so docketed, the issue of the summons, or other mesne process or order, and the filing of each paper; and he shall record in full the return on such writ or order, with the date of its return to the court, which entry shall be evidence of such service."

Section 4961, Rev. Stat., as follows:

"The clerk shall endorse upon every paper filed with him the date of the filing thereof; and upon every order for a provisional remedy, and upon every undertaking given under the same, the date of its return to his office."

It is said in the petition that the clerk when he filed—journalized—this judgment which came down, failed to state



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Shiner v. The Village of Norwood et al.

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on the journal the date of the filing. But it may be suggested that we find nowhere any statute requiring him to do so; indeed, it is said in an early case under the old practice, that the proper practice would be for him to state on the journal that he received at such a time the mandate which he copied on the record; and so, so far as it is contemplated by the statute, it would seem that the record evidence of the filing of the papers is to be found upon the appearance docket and by the file mark upon the back of the papers, and, by that datum, there is no proof here of the record being corrected in any manner, and we are called upon to order a court to do that which they have decided, after a full hearing, they would not do. Of the correctness of that decision we do not know. The presumption is that they decided it upon the law and the facts which were presented to them. The petition does not aver that that was the evidence upon which it was heard there, and all the evidence. In *Hollister v. Judges*, supra, it was decided by a majority of the court, Judge Swan dissenting, but we feel very sure in our own mind, that where the petition sets forth that there has been a hearing upon this motion and the action to the court upon the facts, that the only remedy is for the party to take the petition to the higher courts, and, for that reason, the motion for an alternative writ will be refused. We do this with less reluctance because, upon refusal to grant the alternative writ, the party has a right to proceed immediately to the supreme court and apply for an alternative writ, and without great difficulty, can thus bring speedily this writ before the very highest tribunal in the state, whose decision will be binding as to relator's right to have the alternative writ.

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(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

SHINER v. THE VILLAGE OF NORWOOD et al.

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*Status of property with reference to street improvement fixed at time improvement is ordered—*

(1). The assessment of property for a street improvement is fixed by the status of the property at the time of the passage of the ordinance to improve.

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Shiner v. The Village of Norwood et al.

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*Assessment on tract of land afterwards subdivided—Entire assessment charged on lot last sold—*

- (2). Where the assessment was imposed on a tract of land which was afterwards subdivided into and sold in lots, and whereby, the deeds of conveyance, the burden of the entire assessment was placed on the lot last sold, the municipality may treat such lot as subject to the assessment imposed upon the entire tract.
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Appeal from the Court of Common Pleas of Hamilton county.

A resolution was passed by the Norwood council in 1891, without petition from abutting owners, for improvement of Williams avenue. At that time W. M. Fridman owned a lot abutting 111 feet on Williams avenue and 214 feet on Elsmere avenue. The Fridman tract was subsequently subdivided into four lots fronting on Elsmere avenue, which were all sold to different parties. This left only one of the four lots, the one in the corner, abutting on Williams avenue, and the assessment which it was originally intended should fall upon the entire Fridman tract, was placed against the one lot in the corner, now owned by the present plaintiff, who set up the claim that her lot was only bound for one-fourth of the assessment, and that the village had no right to place the whole assessment upon it.

SMITH, J., holds that the whole Fridman tract was liable to be assessed for the improvement of Williams avenue—that under the decision in *Douglass v. Cincinnati*, 20 Ohio St., 161, the property liable for this assessment was determined by its status at the time of the passage of the ordinance directing the improvement, and the liability thus attaching is not affected by subsequent conveyances and changes in the title. The better course, therefore, would have been for the village to have placed the assessment on all four of the lots constituting the original tract instead of selecting one lot and attempting to hold it for the whole assessment. It might well be that as between the owners of the different lots in which the original parcel had been divided, equities would exist which as between them would make it obligatory upon the owners of some other of the lots to assume the burden of the assessment, and in such case a court of equity would not allow a part of a lot, upon which a village had (arbitrarily it might be) attempted to place the whole of an assessment which was a burden originally upon all, to pay the whole amount.

But the case is different where it appears that by contract or otherwise the burden lies upon one of the lots. In the

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Central Trust Co. v. Ohio Southern Railroad Co. et al.

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case at bar the other three lots were sold with covenants of warranty as to the assessment, but the deed for plaintiff's lot, which was the last one sold, contains no such covenant, and she is therefore not equitably entitled to prevent the village from placing the whole assessment upon her lot, though the village may not have acted in the best manner in so doing. Moreover, where a lien attaches to land which is sold in parcels to different persons, if the lien is enforced at judicial sale, the parcels must be sold in the inverse order of the alienation, which would mean in the present case that the plaintiff's lot would be first liable, and that for the whole amount.

Petition dismissed, but without prejudice to any right the plaintiff may have to call upon the owners of the other lots, or either of them, to share the burden with her.

*Fred Close, Jr.*, for the Plaintiff.

*W. E. Bundy*, for the Village.

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(Third Circuit—Allen Co., O., Circuit Court—Nov. Term, 1898.)

Before Day, Price and Norris, JJ.

CENTRAL TRUST CO. v. OHIO SOUTHERN RAILROAD CO.  
ET AL.

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*R. R. car lease—Insolvency of R. R.—Rights of car lessors—*

Where the court appoints receivers of the property of a railroad company, and directs them to join the company in the execution of a lease, consolidating former leases of rolling stock, the terms of which have not yet expired, the purpose and provisions of which consolidated lease are to provide a lower monthly rental and extend the period of the leases—but leaving the title to the rolling stock in the lessors, with conditions of forfeiture for non-payment of the rentals and other breaches of the covenants, such consolidated lease is not a sale of the rolling stock to the receivers, and the lessors are entitled to preference over the bonded indebtedness of the railroad company, only for the rentals which accrue after execution of such consolidated lease and during the existence of the receivership.

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PRICE, J.

This is the case of the Central Trust Company against the Ohio Southern Railroad Company and other defendants, among whom are the defendants known as "The Car Trust Corporations."

The property of the Ohio Southern Railroad Company has been sold, and the controversy before the court on appeal from the lower court, is between the Central Trust Company,

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of New York, and what will be termed the "Car Trust Corporations," over the proceeds of the sale and their distribution.

The Central Trust Company of New York is the holder of two mortgages or deeds of trust on the property of the railroad company; one was created on the twenty-third day of May 1881, and was made to secure the payment of the sum of four million dollars of bonded indebtedness and the accruing interest, and the second mortgage was executed on the first day of October, 1889, on the same property, to secure a bonded indebtedness of two million dollars and the accruing interest thereon. These mortgages are in form of trust deeds, and their execution was duly authorized by the stockholders and directors of the railroad company, and were duly recorded. The railroad company made default in the conditions of these instruments and failed to pay the indebtedness as it matured, and the Central Trust Company has obtained a decree of foreclosure and order of sale on each of its said liens. It claims that by the terms of the trust deed of May 23, 1881, it has the first and best lien on all the property of the railroad company, and by virtue of the second deed of October 1, 1889, it has the next best and second lien on the property, and it now asks that distribution be made accordingly, except, that certain outlays and other claims growing out of the receivership may be paid, but all such questions are not in contest here, and we give them no further attention, as counsel seem to agree upon their disposition.

The companies, termed the Car Trust Corporations, claim a precedence over the liens created by the said trust deeds in the sum of about six hundred and eighteen thousand four hundred and forty-six dollars, and their demand is founded upon certain car leases—three in number—and especially what is called a "Consolidated Lease" of December, 1895, coupled with the findings and order of the court of common pleas, authorizing the receiver to execute such lease, which order appears under date of January 6, 1896. The lower court construed the consolidated lease and the order authorizing the receiver to execute it, to be a sale of the rolling stock to the receiver for said sum of \$618,446, and that the amount is the first lien on the proceeds of the sale. From this decision the plaintiff has appealed to this court.

The conditions and terms of these various leases and the order of the court, are of first importance, and a thorough understanding and proper construction of them will free the case of all difficulty.

In November, 1892, the Bristol and South Wales Railway

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Wagon Company and two other companies named, entered into a contract with the Ohio Southern Railroad Company whereby they leased to the latter company one thousand cars, the tenancy to commence from the first day of February 1898, and end on the first day of February 1900—a term of seven years, at a yearly rental, but payable in eighty-five monthly installments, for which rental warrants, coupons or notes should be made.

The first party to this contract is designated as "Lessors", and the railroad company as the "Tenant." These cars were to be made by a company named, and it stipulated that the cars when made and ready for delivery shall become the absolute property of the lessors respectively as provided. Each car was to bear upon it a cast iron plate on which should appear the name of the lessor as the owner of such car, and such other marks or insignia of ownership in such lessor as it, or its agent, at any time may see fit to use; and such cars should be numbered as directed by the schedule of lessors endorsed on back of the lease.

The consideration to be paid by the railroad company for the use of the cars, is called "rent", in the contract, and in all its provisions the parties are described as lessors on one side and tenants on the other. The tenants were to make all repairs, and on notice from lessors or their agent, the railroad company, tenant, was obliged to make repairs, and the plate or other insignia of ownership must be kept on each car at all times during said tenancy as the lease reads, for the purpose of making the ownership "publicly known;" if the plate should be defaced or lost the tenant should restore it at once.

By another provision, the tenant is prohibited from assigning, or underletting said cars, without consent of the lessors, and the tenants shall insure and keep up the insurance; and the tenant is forbidden the making of any alterations in any car without lessors to whom the car belong, "consents thereto."

If default is made in payment of rent, and it is not paid within seven days after demand for the same in the form set out, or if the tenant by any means suffers or allows any of the cars (except for interchange of traffic) to pass out of its possession without the written consent of lessors, or suffer the name, plate or other insignia of ownership of lessors to be removed or defaced, the lessors, or either of them, or their agent, may demand in writing the delivery of the cars, and the tenant agrees that within thirty days from the re-

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ceipt of such demand, to deliver up said cars on its road at such place as may be designated.

By the 14th clause it is provided that in consideration of such several eighty-five payments during the term provided for, and all other sums due thereunder and interest due thereon "and the same being fully paid to the lessors, they, the lessors, will at the expiration of the said term of seven years herein provided for, sell said cars to the tenant as follows: for the sum of ten cents per car in United States gold coin \* \* \* and upon such payment and if promptly made, time being the essence thereof, that then said rolling stock, as set out in the schedule endorsed thereon, shall be and become the absolute property of the tenant." \* \* \*

There are other stipulations in the instrument, but they are not important here; but taking it altogether, it is a lease with the right to buy and sell at the close of the term at ten cents per car in gold if all rents and other dues shall have been then fully paid. But if no sale, and the parties cannot agree as to the condition of the car, the difference should be left to arbitration, but the tenant is liable for rent until the acceptance of the award.

The other two leases are very much like the first. By one, two hundred cars are leased; by the other, five hundred and fifty cars. One is for seven years from April 1, 1893. The term of the other is seven years commencing March 1, 1893. The terms of rental on each are provided; the ownership in the lessors of the cars clearly stated, and in each it is provided that any modifications as to the payments or other matter, shall not affect the whole amount for the term or affect the title of the lessors in the property. There are other provisions guarding carefully the title in the lessors. There is a clause which, in certain contingencies of non-payment, authorizes the lessors to take possession of the cars and sell the same and apply the proceeds on rentals, and at the close of each of the latter two leases, there is a right to sell the cars, if all the arrears shall be promptly paid.

In December, 1895, after the railroad property passed into the charge of a receiver, another instrument was executed, which is known as a "consolidated lease," and it is headed a "supplement to lease 82" (The first one above noticed), and leases "Ka" and "Kb", in which all the lessors in the first lease join, and it contains many features similar to those in the originals. The names of the first parties are designated as "lessors," and the other party "The Ohio Southern Railroad Company" and Joseph R. Megrue and Nelson E. Matthews as receivers of said Railroad Company acting in

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obedience to an order of the court of common pleas of Allen county, state of Ohio, made and entered the sixth day of January, 1896, in a suit now pending in said court entitled Rousculp v. The Ohio Southern Railroad Company herein called "the tenants."

This consolidated lease recites the failure of the Railroad Company to pay the rentals as they became due on each of the original leases; and recites the existence of the receivership and that the receivers were without funds to pay the rentals, and that neither the railroad company or the receivers were able to pay the current rentals in full as they are now reserved, without embarrassment to the operation of the road; and further recites that "the receivers have requested the lessor to modify the terms of the said several existing leases so as to extend the payments due under the terms thereof over a longer period of years than is herein provided, and to reduce the amount of the monthly rentals as therein reserved; but not to abrogate the said several leases nor to modify or change the force and effect thereof, except as aforesaid in respect to the amount of monthly payments and the extension of the dates when they shall fall due respectively."

It is further stated that the court has authorized the receivers to join the railroad company in the execution of the new lease; and it then provides that the tenancy shall commence from the seventh day of November, 1895 and end on November 7, 1905, a term of ten years. The 1750 cars are brought within the consolidated lease, and the rentals are divided into one hundred and twenty monthly payments to be represented by warrants and coupons.

It is stipulated in the 5th clause, "that at the end of the tenancy by expiration of the term or otherwise, the said tenants shall and will deliver up and surrender said cars to the lessors respectively as aforesaid, of their agent in proper and complete repair and working condition, less the fair wear and tear, (unless the cars shall be purchased as provided in clause 11) at Springfield Ohio."

And in case of a disagreement between either lessor and the tenants as to the condition of the cars at the end of the term, the same shall be arbitrated etc., etc.

The 6th clause provides for repairs, and the 7th, the placing of the iron plate on each car to show the ownership of the lessors and the same shall be kept on the cars, replaced if lost, etc.

The 8th clause forbids the underletting or transfer of the



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cars, and that the tenants shall pay the taxes and maintain insurance.

The 9th clause prohibits any alteration of the cars without consent of the lessors. By the 10th clause it is agreed that if default is made in payment of rental for a certain number of days after written demand therefor, or if the tenants allow the cars to pass out of their possession, etc., the tenants shall within thirty days after the demand "deliver up to the lessors or their agent each and every car at such place or places as may be designated;" or the lessors or their agent, "may seize, remove and take away the said cars or any of them whether loaded or unloaded, with or without process of law," and by writing put an end to this agreement.

By the 11th clause it is provided that in consideration of the one hundred and twenty payments during said time (ten years) and all other sums due, the lessors will sell said cars to said tenants for ten cents per car in gold coin and on prompt payment, time being the essence, the rolling stock shall become the absolute property of the tenants.

The 12th clause is not of importance in determining the question before us.

The 13th clause, however provides, "that this agreement is made upon the express condition that it shall not operate as a cancellation of any of the agreements recited in the preamble to this agreement, nor so as to defeat or modify any of the rights, property or interest of the lessors or any of them, in and to the said railway cars as the same existed under the terms of said several agreements, except as to the amounts and dates of the monthly rentals; it being understood and agreed that it is the sole intent and purpose of this present agreement, to reduce the amounts of the monthly rentals as fixed by the terms of said several agreements and to extend the dates upon which monthly rentals are to be paid over a longer term of years. \* \* \*"

This is the instrument which the court of common pleas authorized the receivers to execute, and what is it? The parties to it call it a lease. They denominate themselves as lessors and tenants respectively, and all the wording and all clauses are such as are fittingly used to make up a lease. The three original instruments which have all the characteristics of leases, were not abrogated or supplanted by the new instrument. On the contrary, it is expressly stipulated, that they remain in full force and effect with all the powers therein conferred on the lessors, and that the sole and only purpose of the new contract as to reduce the amounts of



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monthly payments and extend their date over a longer period of time. The same conditions for forfeiture for non-payment; for allowing the cars to pass out of the possession of the tenants; for not maintaining the plate on each car showing the ownership of lessors; which were in the original contracts are in the new. All the ligaments by which the "Car Trust Corporations" held the rolling stock in the old contracts, are embodied in the new. And nowhere in it is there the privilege or right to buy and sell until at the end of the term, when all rentals and other dues must be fully satisfied. Not until that period could the railroad company, or the receivers demand and enforce a transfer of title to themselves and terminate the covenants of the leases. And not until that period could the lessors rightfully demand payment of more than the monthly rentals and such other dues as may arise under the contract. The parties have carefully and clearly postponed any transfer of title to the end of the term, and then it is dependent upon all payments being made. Not even at the end of the term, and when all payments have been made, is the tenant bound to take the cars. The tenant has an option to do so and may decline, and then, if the parties cannot agree as to the condition of the cars which are to be surrendered, arbitration shall be resorted to, to settle all differences, pending which rentals still accrue.

If there can be a single element of sale gathered from either of these contracts, it is of a conditional character, a conditional sale, with title all the time remaining in the "Car Trust Companies," until the last dollar has been paid according to the agreement, and also every other condition complied with.

It is claimed, that when the receivers took charge of the railroad, the lessors had been paid on rentals a sum equal to a considerable part of the total value of the cars, and that the cash price on delivery of the cars was above ordinary rentals and should be considered as a partial payment on a purchase price, and that the parties contemplated a sale and purchase in the manner in which cash and monthly payments were provided for in the contracts.

It may be and we might assume that when the "Car Trust Corporation," known as lessors, entered upon negotiations with the railroad company for the manufacture and use of the rolling stock, they calculated the total cost of the cars to be furnished by them respectively, and took that sum into account in fixing a basis from which to compute what they desired as payment on delivery of the cars and the monthly

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rentals, and counted that all such payments having been made when the end of the term should come, they would be fully compensated for their investment, and interest thereon, so that the cars could become the absolute property of the railroad company. This seems to be the plan adopted in framing the terms of the consolidated lease.

What change does this fact work in the construction of the contracts? It is not uncommon that a landlord may fix the rentals of his property at a certain per cent. on each dollar invested in the leased property. He may go further, if he can procure such a tenant, and add to the monthly or yearly payments, a sum which, when it is added to the rentals at the end of the term, will aggregate the value of the property and a rate of interest thereon during the term, on payment of which the property will pass to such tenant. Parties may agree to such terms, and if complied with, the property may thus be acquired. But the title remains in the landlord until the end of the term, and it may be of essence in such contract, that the payments shall continue during the term, and not be paid in advance. The tenant would have no right, unless so written, at the end of half his term, to advance all the remainder and compel the delivery of a deed, because the payments have been fixed otherwise and the tenant would have no right to break up and terminate an arrangement, which might defeat the very purpose of the landlord in entering into such a contract. Of course the death of one or other of the parties, or some such event might happen, as would require a court of equity to intervene in order to protect the rights of parties.

It is claimed here, that a court of equity has intervened on account of the insolvency of the railroad company, whereby its property passed into the temporary control of the court, and its receivers, and that the court made an order, when it authorized the receivers to join in the execution of the new contract of December, 1895, which modifies the stern provisions of the former leases, and takes the case we have out of the control of such provisions.

Ordinarily and generally, insolvency and inability to pay does not abrogate or rescind a contract; and we think it a safe and wholesome doctrine that courts are not to be used to sanction the destruction of contracts, because of insolvency and inability to pay; and we think the court of common pleas, was not so used in making the order of January 6, 1896, wherein the receivers were authorized to join the railroad company in the execution of the consolidated lease.

Counsel for the "Car Trust Corporation" claim much for

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this order, and the fact that its entry was consented to by the Central Trust Company, and we will examine it.

After reciting the date and names of parties to the original contracts, the entry proceeds to find, that all the rolling stock described in said leases, "is essential to the effective operation of the railroad and the defendant railroad company, and that the loss of any portion of the said equipment would impair the earning powers of the said company, and that the prices for all of the said equipment under the respective leases, as determined by the amount remaining due thereon, are less than similar equipment would cost if purchased at the present market prices; and it further appearing to the court, that under the terms of the three several leases, there was due on the seventh day of November, 1895, the sum of \$189,270.04 in overdue rentals, with interest thereon, for the use of the rolling stock leased by the said three leases in the aggregate; and it further appearing, that including said sum of \$189,270.04 there will remain due under said leases the aggregate sum of \$618,456.04; and it further appearing that the said car trust corporations have agreed to make a supplemental agreement for the said rolling stock covered by the said several leases to the said railroad company, and the receivers thereof, at the valuation on the seventh day of November 1895, of the capital sum of \$618,466.04 for the term of ten years upon monthly rental of \$6,559.79 for one hundred and twenty consecutive months, with a provision nevertheless that in order to meet the financial requirements of the said railroad company and its receivers and of the other parties hereto, the said car trust corporation shall for the first forty-two months of the said term of the new consolidated lease, accept the sum of \$6,000.00 per month as partial payments of said monthly rental of \$6,559.79, and shall extend the remaining balance of \$559.79, and shall extend the remaining balance of \$559.79 per month over the remaining seventy-eight months, so that the monthly rentals for the remaining seventy-eight months shall be \$6,948.68 per month; now therefore it is ordered, adjudged and decreed, that the said the Ohio Southern Railway Company, defendant herein, and the said Joseph R. Megrue and Nelson E. Matthews, the receivers thereof, are authorized and instructed to make and execute a new consolidated lease or car trust agreement with the said car trust corporations, based upon the amount due and to become due, under the terms of the said several existing agreements, which sum is ascertained and agreed to be the sum of \$618,46.064, which consolidated agreement shall be for the term of ten years from November 7, 1895," etc.

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The order proceeds to state that the monthly payments shall be \$6,000.00 for the first forty-two months and \$559.79 accruing on each of those months, in addition to the \$6,000.00, to be apportioned over the remaining seventy-eight months. The consolidated agreement contains the same provisions as to the payment of rentals stated in the other.

There is no authority in this order to purchase these cars. It is an order authorizing and directing the receivers to execute the consolidated lease. We have seen that it is a lease, and if the lower court intended to change its character from a lease or conditional purchase and sale, there was the opportunity to so order, and if such an order had been assented to by the Central Trust Company, we would have a different question. No purchase was authorized, none contemplated, and none made.

The 3rd finding of the court of common pleas, preceding the order of January 6th, shows that a purchase was not directed, nor can the power of purchase be implied from it. Every line in that order negatives the idea of a purchase and sale. And that nothing should remain in doubt, another portion of the order speaks as follows: "It is further ordered, adjudged and decreed, that the new consolidated agreement or lease shall not operate to abrogate or terminate the said three several existing agreements or leases between the said trust corporations and the said railroad company, but shall operate only so as to extend the time within which the payment for the rolling stock covered by said leases shall be fully made and to vary and reduce the amount of the several monthly payments so as to conform to the terms of this order as above set out" By this paragraph the court gave a construction of the new consolidated lease and the language is too plain to excite dispute. This rolling stock is still under lease and there is no provision in it making the payments of rentals a lien on anything, much less upon the railroad and other property of the railroad company. The car trust companies, for their protection retained title in the cars, hedged about with the most stringent provisions for their repair and proper use, with a condition of forfeiture if the conditions should be violated. These conditions and provisions were yet in force and none of them have been removed by the order of January 6, 1896.

It has been presented to us in argument, that the claim to preference by the "Car Trust Corporations" over the liens of the trust deed on the proceeds of the sale, is founded on equitable principles, and that, under all the existing circum-

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stances, it is but just, that their claim should have preference. It is urged that the cars are on the line and will be needed by the purchaser of the road and its property and so on. The latter position is but begging the question. As to the claim being founded on principles of equity, let us consider for a moment. We are asked to treat the leases as a sale, which they are not, and we are asked to work some mysterious transformation of the contracts and rights of the parties, so that the unintended shall happen, and that contracts which are leases executed several years after the trust deeds were recorded, shall be now a first lien on the property of the railroad company by decree of the court. No satisfactory reason for this demand has been presented. Equity does not counsel or suggest violation of contracts or the invasion of contract rights. To grant the demand now made would accomplish both. The Ohio Southern Railroad Company is insolvent and unable to buy. The receivers have not purchased, and we are now asked to compel the Central Trust Company, not a party to either contract to unwillingly purchase and pay for these cars, not only what may be now due, but in advance, what would mature during the balance of the term of six years. The car trust companies are now willing to sell, and have asked the court to furnish a purchaser. Such is the legitimate effect of the order we are requested to make. There is no ground in equity, surely none in law, for it to rest upon. It cannot be made.

Again it has been argued, that counsel for the Central Trust Company was present at the time the railroad property was sold, and that the masters who conducted the sale, read and announced to the bidders, that the court of common pleas had ordered the claims of the "Car Trust Corporations" to be recognized in the sale as preferred, and that it was announced that the purchaser would get the cars as a part of the sale, etc.

What of it, if true? It is from the order of distribution that we have the case on appeal; but while that order was in force, although still contested by the Central Trust Company, it would have been imprudent, if not in contempt of that order, for counsel to have interfered at the sale and contradicted the statement made by the officers of that court. Surely no one will insist for a moment that the silence of counsel on that occasion works an estoppel of their contention here.

On the whole case, we are unanimously of the opinion, that there is no equity in the claim of preference of the "Car Trust Corporations," and we find against them on the issue

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presented to us. They have no lien, and therefore no precedence over the appellant in the proceeds of sale, except as to the rentals due during the receivership.

As we have seen, the consolidated lease of December, 1895, provided for the term of ten years from November 7, 1895, at a monthly rental of \$6,559.79 per month, but to meet the financial requirements of the railroad company, and its receivers, the Car Trust Corporations agreed to accept for the first forty-two months the sum of \$6,000, as partial payment of said monthly rental and extended the remaining sum of \$559.79 per month over the remaining seventy-two months.

We, therefore, order, that as a preference to the bonds secured by the first and second mortgages of the Central Trust Company, there be paid from the proceeds of the sale of the railroad property the sum of \$6,000.00 per month from May 8, 1896 (the date of the last payment of rent made by the receivers), until the receivers are discharged, with six per cent. on each monthly installment from the day it matured; and also with like order of preference, that there be paid \$559.79 per month at its present worth for each month commencing on the seventh day of November, 1895, continuing until the discharge of the receivers. The receivers, from proceeds of sale, shall cause to be made all repairs of cars called for by the consolidated lease of November 7, 1895, and also restore all cars which have been destroyed, which is also provided for in said lease.

This cause is remanded to the court of common pleas for the execution of this decree.

*Doyle & Lewis* of Toledo, O., for Plaintiff.

*Cole & Potter*, of New York; *Judge Olds*, of Columbus, O., for Defendants.

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(Eighth Circuit—Cuyahoga Co., Circuit Court—May Term, 1895.)

Before Caldwell, Hale and Marvin, JJ.

CROSIER v. McNEAL.

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*Partnership—Dissolution—Notice to former dealers—*

- (1.) The rule relating to notice of the dissolution of a partnership is essentially different as applied to former dealers with a firm, from the rule which relates to subsequent dealers only. If the retiring partner desires to exempt himself from liability for the debts of the new firm, contracted with a dealer of the old firm, he must cause actual notice of his retirement from the firm to be given to such former dealer. But if the former dealer gets the information from any source of the dissolution of the firm, it would answer the purpose, so it be actual notice.



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*Same—Who not to be considered former dealers—*

- (2.) Where two partnership firms had had some dealings together, and four years, during which time both of the firms had been dissolved, had elapsed since the remaining member of one of the firms, who continued its business, had dealings with one of the members of the other dissolved firm, the latter will not be considered a "former dealer" so as to entitle him to actual notice of the dissolution of the other partnership.

*Information in book of commercial agency—*

- (3.) Where the book published by a commercial agency, in general use at the time among commercial men, and to which the party has access, contains the information that the words "& Co." in a name under which a party does business, are nominal only, it is a circumstance which should go to the jury, and it is error in the court to exclude it from the evidence.

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HALE, J.

The case of William Crosier, Plaintiff in Error, v. Samuel C. McNeal, Defendant in Error, is a proceeding in which the reversal of the judgment of the court of common pleas is sought. The errors assigned are several. I will first notice the errors assigned to the overruling of the motion for a new trial. We were asked by counsel, to carefully read this entire record, and have done so; and have given the case a very careful consideration.

It must be conceded that from 1888 to 1890 a partnership existed between William Crosier and George W. Crosier; any finding of the jury against that proposition would be against the weight of the evidence.

Further, upon the question as to the dissolution of that firm, we think that any finding of the jury holding that the firm was not dissolved in 1890, would be against the weight of the evidence; that the testimony clearly establishes as between the brothers, George W. and William, the firm was dissolved in 1890, so that at the time of the transaction here complained of, no partnership in fact existed between George W. and William Crosier.

The claim in controversy is based upon two bills of exchange or drafts, given by George W. Crosier to McNeal, or acceptances in favor of McNeal, one dated September 6, and the other October 6, and an account for goods sold by McNeal to George W. Crosier & Company on the 6th of October, 1892, aggregating something over \$1,200. Then the liability of William cannot be based upon the fact that he was a partner with George W. as between themselves. Finding as we do, and as the jury should have found, that the partnership that existed prior to 1890, was in that year dissolved, it becomes essential to inquire whether William, al-

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though not a partner in fact, with George W. Crosier, is liable for this claim for any other reason.

The dissolution occurred in 1890. The usual notice of the dissolution of that firm was published in a local paper, of the general circulation a paper printed in a town of the size of Wellington would have, and the ordinary steps taken by the firm, to cause it to be known to the world that a dissolution had taken place. And so far as this record discloses, it would seem to have been well understood in the neighborhood where the firm was doing business, that such dissolution had taken place. And we think it was sufficient to exempt William Crosier from any liability for the debts of George W. Crosier & Company, contracted after the dissolution, with persons who had not been dealers with the firm prior to the dissolution. So that, as to the customers of the new firm, or of the firm after the dissolution, he would not be liable.

But it is claimed that McNeal was a dealer with the firm of George W. Crosier & Company while William was a partner of that firm, and that the transactions between McNeal and such firm were such, as to constitute McNeal what is known as a former dealer with the firm of G. W. Crosier & Co.

The rule relating to notice of the dissolution of a partnership is essentially different, as applied to former dealers with a firm, from the rule which relates to subsequent dealers only. I suppose the rule to be, that if the retiring partner desires to exempt himself from liability for the debts of the new firm, contracted with a dealer of the old firm, he must cause actual notice of his retirement from the firm to be given to such former dealer. I do not mean that, if the former dealer gets the information from any source of the dissolution of the firm, it would not answer the purpose, but actual notice is required in such case; hence it becomes essential to inquire whether Samuel C. McNeal was a dealer with the firm of George W. Crosier & Company while Willie Crosier was a member of that partnership.

The facts bearing upon that proposition are not disputed. Cassidy & McNeal were, prior to, or perhaps in the year 1888, partners, doing business in Summit county, at Peninsula, under the firm name of Cassidy & McNeal. The dealings, it appears from this record, that are relied upon as fixing the status of McNeal as a former dealer with the old firm of G. W. Crosier & Co., were transactions that took place between Cassidy & McNeal, the firm at Peninsula, and



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George W. Crosier & Co. They were sales of cheese from Cassidy & McNeal to George W. Crosier & Co., in 1888. The firm of Cassidy & McNeal dissolved shortly after these transactions. McNeal at the time of the transactions in controversy in this action, was doing business in Akron by himself; Cassidy had gone elsewhere, and was doing business either by himself or in connection with others. Nearly four years had elapsed between the dealings of the firm of Cassidy & McNeal, with George W. Crosier & Co., in 1888, and the transactions out of which this controversy grows, and we hold that considering the length of time that had elapsed; the fact that the dealings were between the firm of which McNeal was a partner, and the firm of George W. Crosier & Co.; that no individual dealing had ever taken place between George W. Crosier & Co., and McNeal; that McNeal cannot be considered, and does not fall within the term of former dealer of the old firm, and is not to be so regarded in settling this transaction. The books of the firm of George W. Crosier & Co. would not contain the name of Samuel C. McNeal. The dealing was with the firm of Cassidy & McNeal, and we do not think that it was incumbent upon the retiring partner, William Crosier, to trace out each individual member of the firm of Cassidy & McNeal, with which his firm had dealt, and see that actual notice was brought to each member of that firm, and if the jury found otherwise it was against the weight of the evidence. Considering the verdict rendered, we think the jury must have found that McNeal was a former dealer with the firm of G. W. Crosier & Co., and that finding we hold was against the weight of the evidence.

This erroneous finding was perhaps partly due to the charge of the court, and in part to the jury. The court did not define to the jury what would constitute a former dealer with the firm of G. W. Crosier & Co.; but left the jury to determine as a question of fact, whether McNeal was to be treated as a former dealer with the old firm, without defining what would in law constitute such former dealer, or giving the jury very much of a guide in determining that question.

Again, it is said that, during the years of '92 and '98, especially in '92 when this transaction took place, William was holding himself out as to be chargeable as a partner as to third persons dealing with the firm of G. W. Crosier & Co. It is true that George W. Crosier & Co. was the style

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of the firm while William was a partner; it is true as we find that that firm was dissolved in 1890; it is true that George W. Crosier continued as between him and William the business in the same firm name; it is true that there was some stationery and bill heads, used while William was a member of the firm, left in the possession of George W. Crosier, and that some of that stationery (and but a small amount, according to his record) was used by George W. Crosier, after the partnership was dissolved; but there is not a particle of proof that any of that stationery was used with the knowledge of William, or with his sanction, or was ever authorized by him in any way.

It is true also that William owned a cheese factory in Pittsfield; that George W. Crosier, after the dissolution, handled the product of that factory; but he had done so for a long number of years prior to the formation of the partnership with William, the same as they handled it after the dissolution and during the existence of the partnership between George and William, and there is nothing in all this that would justify any outsider in dealing with George W. Crosier & Co., after that dissolution, relying upon the fact that William was responsible for the obligations of that firm.

Anybody could have found out, according to this record, by the least inquiry, that William had attempted at least to get out of that firm. George W. Crosier had been doing business here for more than twenty years, William having no connection or partnership with him. In 1888 William did go in partnership with him, which partnership continued to 1890, when William retired from the firm, and the business was resumed precisely as it had been prior to that time; so that upon the facts set forth in this record we find there was no ground upon which William should be held liable for this debt, and that the motion for a new trial should have been granted instead of overruled.

Exceptions were taken during the progress of the trial to the introduction of certain testimony, which testimony was allowed to go to the jury against the objection of the defendant, William Crosier. The objections were general somewhat, and can be classified. I take it that declarations of one partner—statements of one partner after the dissolution, were not competent to bind the other partner, unless authorized by him. I think the court recognized that rule, and undertook to decide as to the competency of the testimony in view of it. But under the claims made, considerable tes-

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timony was given to the jury that ultimately should have no, or at least very little, weight as against William, and it is barely possible that there should have been some limit placed upon the effect to be given to that testimony, by the court in the charge to the jury, but in the main the line of rulings of the court upon this testimony was correct as the case stood at the time that testimony was offered.

The testimony relating to the former dealing of McNeal with the firm of George W. Crosier & Co., while William was a partner, was all allowed, probably under the claim made that McNeal was a former dealer of the firm; but we think it might properly have been limited in its effect, in the charge to the jury.

There was one item of testimony that was rejected of which serious complaint is made, and that is this: as we have found, this firm was in fact dissolved in 1890; Bradstreet's commercial agency published a book which was in general use in 1890 among commercial men, and to that book McNeal had access. That book noted the fact that William was not a partner. The language of the report of Bradstreet was "George W. Crosier and Co., company nominal." Just how much weight that should have had with the jury we do not determine, but in connection with the facts as I have stated, showing that McNeal had access to that book; that it was of general use among commercial men; that that fact appeared in the book, while by no means conclusive, we are all agreed that it was a circumstance that might well have gone to the jury. I think of nothing else that I need to state in disposing of the case. The judgment of the court of common pleas will be reversed. The grounds specified may be, error in overruling the motion for a new trial, and in rejecting the testimony to which I have referred, being the entry in Bradstreet's report.

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(Eighth Circuit—Lorain Co., O., Circuit Court—May Term, 1895.)

Before Caldwell, Hale and Marvin, JJ.

LORAIN STREET RAILWAY COMPANY v. CATHERINE SINNING.

*Appropriation of land for street railway—Compensation for land taken, and damages to remaining land—Rules—*

- (1). Where in proceedings to fix the compensation to a land owner for land taken for a street railroad and for damages to his remaining land, a witness has on cross-examination been made to answer as to a very low sale of land in that neighborhood, it

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is proper to ask him on re-examination as to an exceptionally high priced sale of land in the neighborhood.

- 2). The general rule in such cases is that no deductions for benefits from the damages to the remaining land can be made, until it affirmatively appears that a given case comes within some exception to this rule.
- (3). The true measure of damages to the remaining land is its value before and after the taking of the strip for railroad purposes.
- (4). The elements of compensation are, (1), The abstract value of the land taken; (2), The value arising from the relative situation of the land taken in connection with the remaining land of the landowner; (3), The effect upon the value of the residue on the owner's land, arising from the use for which the appropriation is made.

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MARVIN, J.

This is a case pending here upon a petition filed by the Lorain Street Railway Company against Catherine Sinning to reverse the judgment of the court of common pleas and of the probate court of this county. The action was originally brought in the probate court of this county by the Lorain Street Railway Company to appropriate and have damages assessed for the appropriation of certain lands owned by the defendant, to be used for the purpose of an electric railway.

And after the statutory proceedings were had, preliminary to the assessment of the damages by the probate court, a jury was called and the question of the damages to be assessed after the appropriation, tried to that jury in that court. That action proceeded to a verdict, the jury found a certain amount as the value of the property appropriated, and a certain amount as the damages to the adjacent property of the defendant, Sinning, and judgment was entered upon such verdict; that was affirmed by the court of common pleas, in a proceeding in error in that court, and it is to reverse these judgments that this case is prosecuted here.

It is complained on the part of the plaintiff in error that the probate court erred in the admission of certain testimony, and attention is called to the fourth page of the bill of exceptions as the first place in which there is such error. Charles Sinning was upon the witness stand, the husband of the defendant, and he was asked this question: I ought, however, to say that prior to the question which I am about to read, he had testified as to what the land of Catharine Sinning was worth per acre as he believed, and then was asked, with a view to getting his judgment as to what should be deducted by reason of the construction of the street railroad: "How much would it be worth per acre after the improvement, that is to say how much would this land of Catherine Sinning's, upon which you have given a value as

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it now is, be worth per acre after the improvement?" To this question objection was made by the plaintiff, which was overruled. The ground of the objection was, that to permit him to answer that question was to get to the jury an estimate of the damages without any deduction on account of any benefits, and that this might be a case in which there should be, in considering the damage to the property not taken, but adjacent to that taken, certain deductions on account of benefits. Later on I shall say something which I do not now deem necessary to say as to this question.

It seems to us that whatever the fact may be as to this being a case in which there may be deductions on account of benefits, that is to say, deductions from the amount to be assessed for injury to the premises not taken on account of benefits to such premises, that it would be proper to ask this question. The general rule is, that no deductions from the damages to be assessed for the injury to the premises not taken are to be made on account of any benefits, and until it affirmatively appears that a given case comes within some exception to that rule, it is proper to ask questions upon the assumption that the case is within the general rule allowing no deductions for benefits. With this understanding of the law, we find no error in the ruling of the court permitting the question to be answered.

Later on in the trial, Lewis D. Boynton was upon the stand as a witness for the defendant Sinning, and having qualified and testified as to what he considered the land of Mrs. Sinning to be worth before the improvement, he was asked by counsel for the defendant this question: "Now, Mr. Boynton, after this railroad is constructed through there, at an angle of seventy-one feet from a right angle, trolley wire for propelling the cars, strip sixty-six feet in width, what would be the fair market value of the farm then ~~r~~ acre?" He was permitted to answer. The next question asked of him was: "What value would you place upon the land to be taken?" Objection was made to both of these questions. We think the first question was entirely proper. We are unable to understand what serious objection could be made to it. Certainly the land owner was entitled to have, from a witness who was qualified to answer, his judgment as to what the premises adjacent to those to be taken were worth, both before and after the appropriation of the strip to be taken.

The second question, "What value would you place upon the land to be taken," was not answered, and hence, what-

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ever may be said as to the propriety of asking the question, neither party was prejudiced by its being asked; but, objection having been made to that question, this question was immediately asked of the witness: "What is the fair market value of the land sought to be taken?" This question he was permitted to answer. We see no reason why he ought not to have been permitted to answer. He seems to have properly qualified as to a knowledge of the value of such lands, and, having thus qualified, it was entirely proper that he should be permitted to state what the fair market value of this land sought to be taken was.

Later on, Thomas Negus was upon the stand as a witness for the defendant, Sinning. He had been examined by counsel for Sinning and cross-examined by counsel for the railway company, and was now undergoing a re-direct examination by counsel for Sinning. In his direct examination he had been asked as to his knowledge of sales of land in the vicinity, and had given his estimate of the value of the adjoining land of Sinning, both before and after the building of the proposed railroad. Then, upon cross-examination, he had been asked if he had heard of land in that vicinity being sold for forty dollars an acre, and whether he knew of land thereabouts having been sold for one hundred dollars an acre, and then, upon his redirect examination he was asked this question: "You were asked what you have heard about the market value of lands; had you heard of the company buying three acres of Mr. Carlin for nine hundred dollars?" This question was objected to by counsel for the railway company, the objection was overruled, and an exception taken. Now, it is urged as against this ruling, that the fact that there had been a cross-examination in which the witness had been asked if he knew that lands thereabouts had been sold for one hundred dollars an acre and for forty dollars an acre, did not justify the asking of this question, upon re-direct examination, while, on the other hand, it is urged that this question was but a fair re-direct examination. We are cited by counsel for the defendant in error to the case of Shattuck v. Stoneham Branch R. R., found in the 6th Allen, beginning at page 115, and also to the last volume of Rice on Evidence, p. 604.

The case in 6th Allen, we think, is not near enough like this case to afford us very much light. The citation from Rice is a discussion of what the purpose and office of the re-examination of a witness is, but we do not think that this last authority named justifies this question, and yet we are

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not satisfied that there was such error in allowing it to be answered as would justify a reversal on that ground.

It was treading very close upon dangerous ground, if not clear up to the danger line, but we have decided that the case should not be reversed because of that. There seems to us to be reason for saying that an injustice might be done the land owner if the attention of a witness, who has testified as to the value of land, is upon cross-examination especially called to sales of land in the vicinity made at a very low figure, if upon re-examination the attention of the same witness might not be called to sales made at a high figure. Upon direct-examination the witness gives his judgment as to the value of the land. The questions suggested, put upon cross-examination, are with a view to satisfying the jury that the estimate of value made by the witness is too high, and, if he might not upon re-examination have his attention called to sales of land which had been made at a higher figure, the impression might be left with the jury that he had nothing upon which to base his estimate, except these sales at a low figure, and that his estimate was therefore too high.

So long as the plaintiff had introduced no evidence that this was a case in which there might be an exception to the general rule forbidding deduction on account of benefits, we think it was entirely proper to ask as to the value of the land after the construction of the railroad, "without any deduction on account of any possible benefits," even if it should turn out, when the evidence of the plaintiff should be introduced, that this was a case in which benefits might be offset against injuries.

This same witness was also asked and answered as follows:

"Q. Taking it in relation to the other land, its situation, how much would you consider that strip of land worth—its fair market value? (Referring to the land appropriated.)

"A. I could not put it any more than the other, because there is that much less."

"Q. Taking it in its relation with the balance of the farm?"

"A. It goes across, I expect, the best part of the farm, not exactly the same acres each side."

"Q. In giving the figures \$150, what do you include?"

"A. Between the fences."

"Q. In making up your estimate, what do you include?"

"A. I put that at \$200. I think if I owned land there I

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should be satisfied with \$200 per are, if it was my property. What I say is conscientiously what I believe."

A motion was made to have this taken from the jury, and that motion was overruled. We all know how difficult it is to make a witness understand just what he should answer as to value, and he is very likely to say "I make it so much," when he means that such estimate is his judgment as to the value of the land; and surely his adding, "I think, if I owned land there, I should be satisfied with \$200 per acre, if it was my property," is not prejudicial to the railway company.

An objection was made and overruled, and exception taken to the testimony of one Fleming, but it raises the same question which has already been disposed of in speaking of the testimony of other witnesses as to estimating the value of the land not taken, after the construction of the railroad, without any deduction on account of benefits.

When the plaintiff came to introduce its evidence, it called as a witness as to the value of the property, S. P. Rawson, and he being under cross-examination, was asked as to the depreciation in value of the property by reason of the construction of the railroad, without allowing anything for benefits. In his direct examination he had testified as to the value of the premises before and after the construction of the railroad, and had talked about the diminution in such value by reason of the construction of the railroad, as witnesses are very likely to do, and it is almost impossible to prevent witnesses in such a case from telling the difference in value, instead of simply giving the value before and the value after the construction of the road.

The questions and answers upon cross-examination, to which attention is called, were as follows:

"Q. Now, leaving out of it entirely what benefits the railroad may have upon the land, leaving that all out, just as if it gave no benefits at all to Mr. Sinning, what would you say the market value would be after the appropriation?"

A. "You mean without any railways?"

"Q. Without any benefits whatever, the market value."

"A. I do not think it ought to diminish it over five dollars an acre, perhaps."

"Q. In what would the depreciation consist?"

It will be seen that, if what has already been said in relation to the testimony of the defendant's witnesses is right, the questions here were entirely proper. It is true the witness answered giving his estimate as to the diminution in the value of the land. That answer was given, however,



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to an entirely proper question, and it does not seem to us that the answer given could prejudice the plaintiff. Had the witness been further questioned, there can be little doubt that he would have given such a value to the premises after the construction of the road as, subtracted from the value which he had given before the construction of the road, would have made the difference of five dollars which he gave as his estimate of the diminution in value. We do not feel justified in reversing the case on account of the ruling of the court on the testimony of this witness.

Mr. Osgood, a witness for the plaintiff, was asked in cross-examination whether the railroad would injure the farm. We think there was no error in the court allowing that question to be answered.

Mr. T. M. Brush was introduced as a witness by the railway company, and was asked by counsel for the company as to what the farm would be worth, after the railroad was constructed. To that, objection was made by the defendant. The court explained to the witness and the parties that the witness might answer, excluding benefits. He was not allowed to answer the question without excluding benefits. Having examined the entire record in this case with care, we are satisfied that it is not a case in which any benefits could have been deducted from the injuries to the property, and, that being so, there was no error to the prejudice of the plaintiff in error in the ruling of the court upon this question.

Complaint is made as to the charge of the court. The first objection made is as to what the court said on page 89 of the record. It is as follows:

"Where a piece of land is taken and severed by the appropriation from its connection with the other land of the owner, some elements of compensation necessarily enter into the computation besides the abstract value of the number of feet or acres of ground taken. These elements of compensation may be comprehended in the following:

First—The abstract value of the land taken.

Second—The value arising from the relative situation of the land taken in connection with the residue of the owner's land from which it is taken.

Third—The effect upon the value of the residue of the owner's land arising from the use for which the appropriation is made.

"The defendant is entitled to a verdict for the value of the land taken, not simply to such sum as the land would

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bring at forced sale, or under peculiar circumstances, but to such sum as the property is worth in the market (that is, to persons generally, if those desiring to purchase were found who were willing to pay its just and full value)."

I will first consider these three elements that the court said to the jury should be taken into account. It is urged that if these instructions are followed, the result will be that the land owner will receive compensation twice for the injury to the land not taken; because, after the jury has allowed for the abstract value of the land taken, if then the jury are to take into account the value arising to the land taken from its relative situation to the owner's land from which it is taken; and then again the effect upon the value of the residue of the land from which the appropriation is made; that the jury will be authorized to give twice—I do not mean necessarily twice in amount—but I mean the claim is that they will have a right at two different times and under two different heads, to fix the damages to be assessed for injury to the land not taken.

I am not sure that the probate court in giving his instruction occupied the exact language of the supreme court of Ohio, used in the case of the Cleveland and Pittsburgh R. R. Co. v. Ball, as found on page 576 of the 5th Ohio State Reports; but certainly, if it did not copy exactly the language there used, it followed very nearly the language, and certainly followed the spirit of what is there said.

The reason, as it seems to me, is that these parties are entitled to the abstract value of the land taken. That land may be half an acre of land off the back part of one's farm, and this land being away from any highway might be worth very little sold by itself, but yet, when taken in connection with its relation to the residue of the owner's land, it might be worth just as much per acre as the balance of the farm; that is to say, you have a farm worth \$100 an acre taken as a whole, and take out one-half acre of it, which is just as good as the rest, but take it off the back end of the farm, away from any highway, and that would not sell by itself at the same rate, but in estimating its value in a case like this the land owner should be paid in full for just what that one-half acre would be worth, and what it was worth taken with the farm, and that is all there is contained in this second paragraph. The supreme court has fixed this rule, and I think the probate court here clearly followed the rule laid down by the supreme court.

I call attention to certain language of the court which is

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not complained of, in connection with the balance of the charge, with a view to determine whether the charge of the court as a whole was prejudicial to this plaintiff in error. On page 90 the court used this language:

"After ascertaining the value of the property taken, you should next ascertain the depreciation, if any there be, in the value of the remainder of the defendant's land by reason of the appropriation of the strip described in the petition. If you find the value of the remaining portion of the land is not diminished by reason of the appropriation, it will only be your duty to give defendant the value of the land appropriated; but if you find the remainder of the land is depreciated in value by reason of the appropriation, you should then inquire into the amount of such depreciation in dollars and cents." And follows with this language: "To ascertain this, your first duty will be to find the market value of this property, that is, the value before this strip was taken off; and then find the market value of the property after the appropriation, and the difference will be the damages to the property for which the defendant is entitled to recover. The defendant having the right to use or sell this property for any legitimate purpose, you may consider what effect the taking of this property, the manner of its use, will have upon the balance of the land. Will the property be less saleable in the market and rendered less valuable thereby? The difference in the value of the owner's property with the appropriation and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation and surroundings. It must not be enhanced by proving facts of a contingent or prospective character."

Now, that is fully as favorable as the plaintiff could ask to have a charge, and taken in connection with the other, it seems to me gives the jury such instructions, if they were followed, as that they could not make any mistake, prejudicial to the plaintiff, as to what their findings should be.

The plaintiff requested the court to instruct the jury as follows: "If the jury should find that any incidental damages will accrue to the lands of the defendant not appropriated, the jury should take into consideration and estimate any local incidental benefits that will accrue to the defendant from the construction of the work proposed, not common to the public at large, and the amount of such incidental benefits should be deducted from the amount of such incidental damages."

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This the court refused to give. It is not worth while to take time here, to call attention to the case of R. R. Co. v. Ball, in the 5th of the State Reports. It is familiar to counsel on both sides of this case, and to the bar generally. The reasoning there is that, while there are to be no deductions from the value of the land taken by reason of any benefits that will accrue to the owner, yet there may be local incidental benefits, peculiar to the land owner—that is, which the land owner will derive from the improvement, and which the public generally will not derive—which may be deducted from the local incidental damage to the lands of the land owner which are not appropriated—that is, local incidental, peculiar benefits which will accrue to the land owner cannot be deducted from the value of the land taken, but may be deducted from the incidental damages to other lands, which the land owner will suffer by reason of the appropriation.

In that case there was a coal mine, and coal had been conveyed to market by a river, and they built a railroad. The question was asked whether the facilities for getting coal to market would be any less, and it was held it was proper to have asked that question; but as I have said, I have read this record, and I do not see anything in it to justify that charge. I do not see anything in the record tending to show local peculiar benefits to this defendant, Sinning, not common to the public. She is entitled to the benefits, as are the entire public, in having the railroad through there.

This question was also made:

“If the jury find that the incidental benefits arising to the defendant, Sinning, are equal to, or exceed, any incidental damages which may accrue by reason of this appropriation, to her lands not appropriated, then no amount should be awarded her as damages.”

As already stated, the facts in this case are not such as to have made it error to refuse this. This request was also made:

“If the jury find that the market value of the land of the defendant, Sinning, not appropriated, is as great after the appropriation as before, then no damages can be awarded to the defendant.”

The court said as to this: “I give you this subject to what I have said before as to off-setting benefits. But you cannot take into consideration after the appropriation is made any benefits accruing to said land not appropriated by reason of the appropriation.”

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Under the facts of this case, we think that instruction was proper; that it was proper to give it as modified, and there was no error in refusing to give it without modification.

On page 94 of the record this request was made:

"The jury are bound to return to the defendant, Sinning, full compensation for the 71-100 acres of land appropriated from her. If you find that the remaining property of Mrs. Sinning is increased in value rather than diminished, such increase cannot be taken into account in fixing the value of the 71-100 acres, but in that event Mrs. Sinning would be entitled to no damages to the balance of her property."

We do not think it was error to refuse that, under the facts of this case, for the reasons already given.

There was another request, but what has been already said of the charge given applies to this and to whatever else there is in the charge.

Taking the entire record together, we think no error to the prejudice of the plaintiff in error is shown, and the judgment of the court of common pleas is affirmed.

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(Fifth Circuit—Stark Co., O., Circuit Court, 1896.)

Before Jenner, Pomerene and Adams, JJ.

THE TRUSTEES OF THE REFORMED CHURCH OF UNION-  
TOWN v. J. G. WISE ET AL.

*Will—Provision in husband's will for wife, made during wife's life, lapsed on her death her husband surviving—*

Wills were mutually made by a husband and wife who each owned property. At the same time they entered into a contract in writing, providing that the provisions of these wills should be unalterable and irrevocable "as between the parties to this contract". After the death of the wife the surviving husband changed his will. On his death the parties who would have been entitled to legacies under the husband's will as originally made and, as heirs to the wife, to the legacy made to her in such original will, claimed the legacies, by virtue of the provision of the contract that the will as originally made should be unalterable and irrevocable. Held, the provision in the contract "that the wills should remain unalterable and irrevocable as to the parties to the contract," only referred to the husband and wife as the only parties to the contract; and even if the husband's original will had remained in force, the provision for the wife made therein had lapsed by her death before the husband, and her heirs would not be entitled to anything under such will.

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POMERENE, J.

The case of the Trustees of the Reformed Church of Union-

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town v. The Executor of the Estate of John G. Wise, was submitted upon error, together with the other case of Rebecca Wise's Administrator v. The Same Executor. Both cases involving the same question, were submitted to the court, and argued together, and the disposition of one, at least the disposition of the case of Rebecca Wise's Administrator v. Stull, will also decide the other case.

It comes up under a demurrer to the petition in the first case—amended petition; and in the second case there is a demurrer to the petition of the plaintiff, and also to an answer and cross-petition of certain defendants, being the heirs of Rebecca Wise.

It presents about this state of facts: That in 1878, John G. Wise and Rebecca Wise were husband and wife, living together, each owning property in their own right. John G. Wise being the owner of a farm of one hundred and twelve (112) acres of land in this county; Rebecca Wise being the owner of a town lot in this county. That they on the same day made wills, each of them making a will, which was done in pursuance of an agreement entered into. It was stated that this agreement and these wills were written by the late Judge Meyer, who certainly understood how to write a will and how to write an agreement, and who understood the English language.

The view that we have come to on the question presented is based materially upon this agreement. Counsel for the plaintiff in both cases seek to recover upon the agreement rather instead of the will. Now this agreement reads as follows—wills and agreements are of the same date, executed, no doubt, at the same time: "The undersigned, husband and wife, have each this day executed a last will and testament, making disposition of the property which they severally own; and it is hereby declared such were executed under an arrangement previously entered into between the undersigned, by the terms of which it was agreed that neither party should gain more by reason of an existing law than the provisions made for him or her in the other's will. That such wills should be unalterable and irrevocable in so far as relates to the interest of each party, their heirs or legatees in the property of the other as the same has been fixed by said will. And it is also declared that each of said wills was executed in consideration of the execution of the other."

Now, Rebecca Wise, at the time of making her will, which was in 1878, gives to her husband a life estate in the house and lot of which she was then the owner; she gives to the

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Reformed Church one thousand dollars, and two hundred dollars to the family monument. The provisions of John G. Wise's will, as it appears, were that he gave to his wife, Mrs. Rebecca Wise, an undivided fourth of his real estate, one hundred and twelve acres, five hundred dollars to the church, and three hundred dollars to the family monument.

Now, after this will was made, as stated, in 1878, in August 15, 1881, Rebecca Wise died, without any change or any alteration in the will. Her will was admitted to probate and the provisions carried out.

John G. Wise continued to occupy and enjoy this property, the house and lot, up until the time of his death; but in December, 1891, he changed his will—does not give the five hundred dollars to the church, and does not give to the heirs of Rebecca Wise the one-fourth of his real estate; but before this time, perhaps, after the execution of the will, and after the death of Rebecca Wise, he sells this real estate.

Now, the administrator of Rebecca Wise with the will annexed, and also her heirs, come in claiming the one-fourth of his real estate under this will and under this contract. The question is, are they entitled to recover?

The purchaser of the real estate, being conceded to be an innocent purchaser, not knowing of this contract nor of these wills, the title passed to him; their claim is to the one-fourth of this fund, or the one-fourth of the value of this one hundred and twelve acres. That calls upon the court for a construction of this contract; as to what this contract in fact means—what was intended by the parties.

It is a principle and a rule that parties entering into a contract make their contract with reference to the law then in force with reference to that. And what was the law at this time with reference to the rights of these parties as husband and wife?

As to the wife, on the death of her husband, she surviving him, she was entitled to hold the one-third of his real estate, as her dower during her life. As to the husband, he was entitled to hold this property, all her real estate, during his life. That is the situation. He no doubt knew it. We have a right to suppose he did know it.

Now, how do they contract with reference to themselves in that particular? The will executed at this same time gave to this Rebecca Wise and her heirs one-fourth of his real estate; that is, a fee in the one-fourth, the dower interest being one-third of the real estate during her life. He gets exactly what the law would have given him. He gets the use



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of this house and lot during his life. He would have got that by the law. It does not appear, so far as I have been able to notice, and I do not know that it has anything to do with the question at issue here, as to what other property these persons may have had. These legacies which I have mentioned, are the ones which are set up and undertaken to be enforced.

Now, by the terms of this contract, it was agreed that neither party should claim more by reason of any existing laws, than the provisions made for him or her in the other's will.

That is one thing in the contract. Another thing, they contract here that such will should be unalterable or irrevocable, in so far as relates to the interest of each party, their heirs or legatees, in the property of the other, as the same has been fixed by said wills.

Now, as to that provision, that it shall be unalterable or irrevocable, does that apply to all the legacies or all the provisions of the will, or was it intended to apply simply to that which was given to the husband, and to that which was given to the wife? If it was intended to apply to all the legacies, devises and gifts, it would have been sufficient to have said so, and it seems to us that the scrivener would have said here that "such will shall be unalterable or irrevocable;" but he says "in so far as relates to the interest of each party." Now, the interest of each party is that which they get by the will. It seems to us it could have no reference to that which was given to the church, but that given to each other.

Rebecca Wise dies in 1881; her husband enjoys this estate; he gets nothing more than the law would have given him. Upon her death, what becomes of this legacy? That is, the legacy which he gave in his will—the one-fourth of his real estate? Now, we think clearly by the common law, and the statute, section 5971, I believe, does not change the common law in this respect, that this legacy to her lapsed. So then, if this will had not been revoked that was made in 1887, but had remained at the time of the death of John G. Wise, and had been probated, what would have been the result? Would her heirs have taken anything under this devise? We think not. Then, if the heirs of Rebecca Wise, being her brothers and sisters, and legal representatives, come up and file the answer and cross-petition—if they could get nothing then by the will, could they have anything then by this contract—when the contract provides for the mak-



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Kuhl Artificial Stone Co. v. Mack.

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ing of the will, agreement to make a will under those provisions?

Now, our construction of this contract is, that these provisions "unalterable and irrevocable in so far as it relates to the parties in interest," were what was intended by the parties at that time; and that this contract could have no greater force than if the will had been allowed to remain in force.

This being the case, we do not see how it is possible that the administrator of Rebecca Wise or her heirs have any interest in his will, or can claim any interest; and therefore we think that the demurrer was properly sustained in both cases; and the judgment will be affirmed.

I might add that we examined nearly all the authorities submitted in the case, and while we recognize the rule there, this is presented upon a construction of a contract.

*Turner & Webber*, for Plaintiff in Error.

*Willison & Day*, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1899.)

Before Shearer, Summers and Wilson, JJ.

THE CHARLES KUHLE ARTIFICIAL STONE CO. v. MARTIN MACK.

A custom claimed among contractors to help themselves to each other's material unreasonable and not binding, but competent to prove absence of criminal intent.

Error to the Court of Common Pleas of Hamilton County.

The defendant in error recovered a judgment for \$885, damages for malicious prosecution on a charge of taking a small quantity of the Kuhl Company's material in completing a cement sidewalk contract, a line of work in which the Kuhl Company and Mack were competitors. Error was claimed in the admission of testimony as to a general custom prevailing among contractors of helping themselves to each other's material when a small quantity was needed to complete a job.

The reviewing court holds that while such a custom is unreasonable as a rule of property, and therefore not binding, yet it was competent for the purpose for which it was evidently introduced—that is, as tending to prove a lack of criminal intent.

Judgment affirmed.

*Jerome D. Creed*, for the Plaintiff in Error.

*Geo. W. Hardacre*, contra.

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Jennings et al. v. Ohio National Bank et al.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1894.)

Before Bentley, Haynes and Scribner, JJ.

JENNINGS et al. v. OHIO NATIONAL BANK et al

*Equity—Marshaling liens—Two parties having liens on same property, where one also has lien on other property—*

The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. But this rule must be taken with the modification and exception that in its application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, and that no superior equities of others are interfered with. And where a party takes a judgment and acquires a lien on personal property by levy, all during the pendency of the action of an older encumbrancer and after the judgment in the latter's favor in that action and levy on the personal property of the debtor thereunder by such senior judgment creditor, it is not competent for such junior judgment creditor, whether party to the action or not, to come in and attempt by a subsequent levy upon his judgment to displace the rights of the senior judgment creditor to have the property appropriated to their earlier judgment, on the ground that the senior judgment creditor had, besides the personal judgment against the judgment debtor under which their levy on his personal property was made, also in the same action obtained a decree of foreclosure of a mortgage on lands of the debtor, by which their debt was secured, and which it is claimed should have been exhausted first before levying on and satisfying his claim out of the debtor's personal property.

Error to the Court of Common Pleas of Lucas county.

SCRIBNER, J.

On November 18, 1889, Perry Wood, as guardian of Samuel Wagrner, brought his action in the court of common pleas of Lucas county, Ohio, against Franklin D. Cummer, the Flint Glass Sand & Stone Co., and the Ohio National Bank of Cleveland, Ohio. The proceeding was instituted upon a promissory note executed by Franklin D. Cummer, the payment of which shortly afterwards was assumed by the Flint Glass Sand & Stone Co., and also for the foreclosure of a mortgage given by Cummer to Wood as guardian, upon certain real estate in Lucas county, to secure the payment of the note in question. This note was dated August 1, 1888, and the mortgage bears date August 18, 1888. It is set forth in the petition that the defendant, the bank, claimed to have some lien upon or interest in the real estate, and for that reason was made a party defendant to the proceed-

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ing. A personal judgment and the usual decree in foreclosure was rendered upon this petition by the court of common pleas, June 24, 1890. This personal judgment was rendered against Cummer, as the original maker of the note, and the Flint Glass Sand & Stone Company, on its alleged liability for the payment of the note growing out of the transaction between Cummer and that company. It appears in the record that shortly after the execution of this mortgage the Flint Glass Sand & Stone Company, in consideration of the transfer to it of the property mortgaged by Cummer, assumed payment of this promissory note, and on the note as against Cummer and upon the contract as against the Flint Glass Sand & Stone Company, a personal judgment was founded, attended as I have said, with the ordinary decree in foreclosure. Some time prior to May 7, 1892, a judgment and decree so obtained were transferred to Henry E. Palmer, but we do not find, on examination of the record, that Mr. Palmer was ever made a party in any form to this proceeding; and if he was so made a party, we have overlooked it.

The bank, which was a party, filed its answer and cross-petition against the Flint Glass Sand & Stone Company and the defendant, Cummer, on January 23, 1890. This was really a short time prior to the entry of the judgment and decree in favor of Wood as the guardian of Wagner—which appears to have been entered, as I have said, on June 24, 1890. The cross-petition of the bank was on file at the date of the rendition of the judgment and decree in favor of Wood as guardian of Wagner.

The cross-petition of the bank was founded upon sundry promissory notes which are set out in its cross-petition, and a second mortgage given upon the same property described in the other mortgage, to secure their payment. The cross-petition also contained a prayer for personal judgment against Cummer and the Flint Glass Sand & Stone Company, as well for the sale of the mortgaged premises.

Under sec. 5055, Rev. Stat., this cross-petition would appear as *lis pendens* from the date of its filing, January 23, 1890. This section reads as follows:

“When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency; and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title.”

This section simply embodies in statutory form the established doctrine upon the subject of *lis pendens*. The plain-

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tiffs in error in this case, Jennings and Berry, recovered a judgment against the Flint Glass Sand & Stone Company, for \$600 and costs. It does not appear upon the record that the defendant, Cummer, was a party to this judgment—it was simply against the Flint Glass & Stone Company. This judgment was rendered on March 31, 1891, in the court of common pleas of Lucas county, Ohio, and became a lien by force of the statute on the mortgaged premises described from January 5 1891, the date of commencement of the term upon which this judgment was rendered. On this judgment various payments have been made aggregating \$253.39, and the balance remained unpaid. This judgment was assigned to Berry October 5, 1891. One-half of it was re-assigned to the plaintiff, Jennings, April 19, 1892. This judgment was recovered pending the cross-petition proceedings above set forth in behalf of the bank and after the recovery of the Wood-Wagner judgment and decree. As before stated, it became a lien by virtue of the statute upon the mortgaged property from January 5, 1891. Execution was issued on the Wood-Wagner judgment above set forth at the instance of Palmer, the assignee thereof, May 5, 1892. It was levied on the personal property of the Flint Glass Sand & Stone Company on the same day. Decree was rendered on the cross-petition of the bank, May 7, 1892, being at the term of the common pleas which was begun on April 5, 1892. A personal judgment against Cummer and the Flint Glass Sand & Stone Company was also rendered in the same proceeding, for \$48,746.66 and costs. The court found in rendering that decree and personal judgment, that the mortgage of the bank constituted a second lien upon the mortgaged property; that it was subject only to that of the Wood-Wagner lien; that there was due on the Wood-Wagner judgment and lien \$8,746.61, with interest from April 8, 1890, at 7 per cent. per annum, still in force. It was directed that an order of sale should issue. The court also found the order of the liens in the same proceeding, as follows: First, the costs. Second, the amount due Palmer on the Wood-Wagner decree, as assignee thereof. Third, the amount due to the Ohio National Bank. Fourth, the balance to go to the Flint Glass Sand & Stone Company.

Execution was issued on the Berry-Jennings judgment on May 9 1892. It may be observed in passing that this was two days subsequent to the rendition of the judgment and decree in favor of the bank, which was on May 7, 1892.

On May 9, execution was issued on the Berry-Jennings

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judgment and was levied on the same day, on the same personal property seized upon the execution issued upon the Wood-Wagner judgment. On May 17, 1892, an order of sale was issued on the decree of the bank. On May 20, 1892, the personal property which had been levied upon, first at the instance of Palmer on the Wood-Wagner judgment, and second at the instance of Jennings and Berry on their judgment, was sold to Palmer, for \$8,450.00. It will be observed that this sale took place on the day before Jennings and Berry made application to be made parties to the pending proceedings to which I have referred, for the purpose of asserting the claims which they afterwards made. On May 21, 1892, being, as I have said, the day after the sale of the personal property and several days after the decree was had, Jennings and Berry made application to the court, or moved the court, for leave to be made parties. This motion was granted on June 13, 1892. An order of sale was issued on the decree of the bank, May 11, 1892. The mortgaged premises were sold to Palmer, under this order of sale, on June 18, 1892, for \$30,667.00, being two-thirds of the appraisement, and this sale was confirmed and distribution ordered July 2, 1892.

The cross-petition filed in the case sets forth sufficiently the claim on the part of the cross-petitioner, and shows plainly the matter in contention here. They set up the judgment, as I have already stated it, and the amount due upon it; the issue of execution at the instance of Palmer, on the first judgment, and its levy upon the personal property, and its advertisement for sale by the sheriff, and then say:

"That on May 9, 1892, these answering defendants duly caused an execution to be issued on their said judgment in said cause No. 30,598, to the sheriff of said county, who, on said day levied the same upon said personal property already in his possession seized under the levy hereinbefore mentioned in favor of said Henry E. Palmer, and thereby these answering defendants acquired a valid lien on said personal property next and subject only to the lien of said Palmer thereon.

Then they state the sale of the property and the price for which it was sold, and they add:

"That said Palmer, by virtue of the decree rendered herein by this court on June 24, 1890, has long had the first and best lien upon the real estate described in the petition herein as security for the payment of his said judgment; that said real estate has at all times been worth many times the

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amount of his said judgment, and he could easily have obtained full satisfaction from the sale of said real estate; that, notwithstanding the premises, said Palmer proceeded to levy and get the first lien upon the said personal property, and without regard to the equitable rights of these answering defendants, to have him satisfy his said judgment out of the fund arising from said real estate and to leave the fund arising from the sale of said personal property for the satisfaction of these answering defendants, said Palmer has proceeded to exhaust the said personal property, and thereby prevented these answering defendants from being satisfied therefrom; that in equity and good conscience these answering defendants are entitled to be subrogated to the extent of their said judgment to the lien of said Palmer upon said real estate and to his rights thereunder."

And the prayer of the petition is in accordance with that claim. Briefly, then, it may be stated that the claim of these plaintiffs in error is this—though before passing to that, we fail to find anything in this record, except the finding of facts by the court and the judgment thereon, which particularly interests Smith & Co., and the other parties associated.

"Mr. Huntsberger: Is not their cross-petition in the record there?

"The Court: No.

"Mr. Huntsberger: Then that is an omission.

"The Court: There is among the files, a motion by those parties to be permitted to be made parties and to file an answer and cross-petition; and that motion seems to have been granted, but there is nothing to show that they ever filed an answer and cross-petition; but the court passed upon their rights.

"Mr. Huntsberger: Yes, it was present in the court below.

"The Court: The petition of these plaintiffs in error, briefly, is this: that Palmer had his mortgage and decree upon the real estate; he had a levy upon this personal property. The plaintiff—by force of the statute, whether they chose to rely upon it or not—had a lien also upon the real estate, third in order, however, because the bank had the second lien by way of a mortgage upon the real estate. Jennings and Berry, having, as appears in the case, a second lien upon the personal property, by virtue of their levy subsequent to the levy of Palmer, and having also a lien really upon the real estate by force of the judgment only, never-

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theless, as they claim, are entitled—Palmer having subjected the personal property to sale upon his execution and realized some \$8,000 by that sale—they are entitled to have, to a proportionate extent, their mortgage satisfied from the proceeds of the real estate. And that claim is made upon the doctrine laid down in *Green v. Ramage*, 18 Ohio St., 428, where this proposition is stated by the court:

“Where A. has a mortgage upon two lots, and B. has a subsequent mortgage upon one, and C. upon the other of the lots, of a later date than the mortgage of B., A. cannot be compelled at the instance of B. to exhaust first the lot on which C. has his mortgage.

“In such case A. will be required to make his debt out of both lots in proportion to the amount that each may produce.”

And briefly stated by the court in its opinion, we find this conclusion:

“We think, then, that justice between Hillier and Green requires that each should have the full benefit of his mortgage, and this can only be done by requiring Wilson to take his debt out of the proceeds of both lots proportioned to the amount that each lot may produce.”

The application of the doctrine to this case it is said will produce this result: Mr. Palmer has his decree and lien upon the real estate. A sale of the real estate produced some \$80,000. He has his levy upon the personal property. The personal property produced upon sale by the sheriff some \$8,000, and now it is claimed that upon a proper application of the doctrine in the case of *Green v. Ramage*, supra, that these plaintiffs holding a subsequent lien upon the personal property by virtue of their levy, are entitled substantially to have Palmer's judgment satisfied proportionately from the proceeds of the real estate and from the proceeds of the personal estate, and that he having sold the personalty and having sold the real estate, that plaintiffs are entitled to be subrogated to his rights in that respect under the equitable doctrine which has been referred to in the cases cited.

Now, upon the general subject, among the text-books cited (which really repeat one after the other the same doctrine) reference has been made to volume three of Pomeroy's *Equity Jurisprudence*, sec. 1414:

“The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by



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his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of lien, or interest, can resort to two funds, and another to one of them only, as for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another, the former must seek satisfaction out of that fund which the latter cannot touch. It, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security; that the rights of third parties shall not be prejudiced; and that the parties themselves are creditors of the same debtor."

I call attention, in passing, to this clause in the section, which is fortified by a large citation of authorities "These rules must be taken with the modifications and exceptions \* \* \* that the rights of third parties shall not be prejudiced."

Again, in volume 14, American and English Encyclopedia of Law, 68—where the section cited by counsel from Judge Story's Equity Jurisprudence, sec. 633, is copied; and reading a small portion of the discussion contained in the annotation by the author, we shall find the doctrine stated as we understand it:

"The equity being against the debtor, it is equally against his judgment creditors whose liens were obtained subsequently to the lien of the junior creditor in whose favor the equity is enforced. Thus in Robeson's Appeal, 117 Pa. St., 628."

And, by the way, I might mention that these debtors are of opinion that that case overrules the case cited by counsel for plaintiff in error in their brief, found in 8 Watts (Penn.), 477, and I find that case cited in the brief of counsel to support several propositions.

"Thus, in Robeson's Appeal, 117 Pa. St., 628, the owner of a tract of land gave a judgment to A. and then a mortgage to B. Subsequently the owner acquired a second tract, on which A., by a revival of his judgment, obtained a first lien."

So that it will be observed that A. had a lien upon one tract, and B. a mortgage upon the same tract, second in order; and then A. acquired a first lien upon the second tract acquired afterwards by that debtor.



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"Subsequently the owner mortgaged this second tract to C. Upon a distribution of the proceeds of both tracts it was held that C., having had record notice of the other liens, B., under his superior equity, could require that the proceeds of the second tract should be applied to A.'s judgment in relief of his own lien upon the first."

Here A. has a first lien upon a tract of land, and B. has a second lien by mortgage. The debtor purchases the second tract upon which A. obtains a first lien. Then C. takes a mortgage upon the second tract, and the proposition ruled by the court was, that B., who had a second lien upon the first tract, could compel A. to exhaust the second tract upon which B. had no lien, even to the exclusion of C., who had taken a mortgage upon that tract, thereby relieving the tract of the first purchase upon which B. had a second lien. And the court said:

"This equity, we have said, was against the debtor, and it is equally such against his subsequent mortgage creditors with notice, who can have no greater rights than the debtor had at the time the mortgage was given. This equity existed in favor of the appellants before the appellees acquired their lien; prior in tempore potior in jure. The appellees must be considered to have taken their mortgage subject to the prior equity of the appellants.

"In Delaware & Hudson Canal Co.'s Appeal, 38 Pa. St., 573, a mortgagor had other lands than those mortgaged, which, including the mortgaged premises, were bound by four earlier judgments. Subsequent to the mortgage were other judgments which were liens upon all the lands. Upon the distribution of the proceeds of a sale of all the lands the court subrogated the mortgagee to the rights of the senior judgment creditors in the lands not covered by the mortgage. It was distinctly held that the judgment creditors subsequent to the mortgage had no rights superior to those of their debtor. The same principle is recognized in Hastings' Case, 10 Watts (Pa.), 303. These cases and Robeson's Appeal, 117 Pa. St., 628, overrule Miller v. Jacobs, 3 Watts, 477, where it was held that a creditor who has a lien on two funds may throw the whole burden on one of them, to the exclusion of a junior encumbrancer, if the other fund is subject to incumbrances, which, though posterior in date, are sufficient to absorb the whole, because the effect of such a course is merely to postpone one creditor to another, and it does not enable the debtor to get back the estate discharged of the lien. In Hoff's Appeal, 84 Pa. St., 40, it was

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held that a bona fide purchaser may be unaffected by an equity of which he had no notice in fact.

"The general principle is explained by Judge Hare in a note to *Aldrich v. Cooper*, 2 Lead. Cases in Eq, 266, as follows: 'The equity has its root in the obligation of the debtor, but is also an equity among the creditors, that each shall, when it can be done without loss or inconvenience, so use his right that all may, as far as the circumstances admit, be satisfied in the order in which their liens severally accrued. A. has a paramount lien on two tracts of land, B. a lien on one of them, and C. a subsequent lien on both. If A. exhausts the tract which is the subject of B.'s lien, B. will be subrogated to A.'s lien on the other tract, although C. is thereby excluded from the fund.' "

Now here are A., B. and C. A. is first, B. second upon a portion of the fund, and C. third upon all of the estate. B. is allowed to partake of the fund.

"A writer in the *American Law Register*, vol. 27, page 738, states the rule concisely as follows: 'If a paramount encumbrancer of two funds, by his election of remedies, disappoints a junior creditor, who has a lien upon one of them only, the latter shall, to that extent, be substituted to the lien of the paramount encumbrance upon the other fund bound by it, as against the debtor and all claiming under him, by lien or title subsequent in time.' "

In the case of *Phillips v. Bell*, 4 C. C. 316, I find this statement in the conclusion of the court upon the proposition here presented:

"Where one person has a lien upon two or more tracts of land, and another a lien upon only one of them, the person having the lien on all will be driven to assert it against that on which the other has no lien," unless the superior equities of others are interfered with, which shows a qualification of the general doctrine which seems to be of some importance.

We intended to state, but perhaps may have omitted to do so, that the judgment of the court of common pleas rendered in this case was against the claim made by the plaintiff in error. That is, of course, to be assumed from the fact that they are here with their petition in error. The fund was applied first to the *Wood Wagner* judgment, and secondly to that of the bank, which exhausted the entire fund. Now, applying these views briefly to the case in hand, I will refer to some of the facts which have been stated.

In the first place, Palmer having under his execution caused

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levy to be made upon this personal property on May 5, 1892, and thereby acquired two securities for his debt; the mortgage which was prior in time, and the levy upon the personal property which at that time constituted the only charge or lien upon the property, it appears to us that upon that levy being made, the Ohio National Bank here could have compelled Palmer to exhaust the property so levied upon before resorting to the realty upon which it held second lien. The right to do this Palmer possessed by the levy. The right so attached could not be displaced or impaired by a subsequent levy at the instance of another judgment creditor. That levy when made by Palmer constituted pro tanto satisfaction of the judgment. Upon a sale being made upon that execution there was no confirmation necessary; there was no action of a court of record; the execution was issued and levied and the property sold in regular form, and bid in by the judgment creditor. Unless upon some proceeding, instituted in proper form, that sale was set aside (which was never attempted in this case), the moment the sale was made and returned, there was, pro tanto, by operation of law, a satisfaction of the judgment.

a Upon this proposition, I refer for a moment to two cases cited by plaintiff in error here: *Fassett v. Traber*, 20 Ohic, 540, the syllabus of which is as follows:

“When two creditors have each a lien on the same property of their debtor, and the one having the prior lien has also a lien on another fund for the same debt on which the subsequent lienholder has no claim, such prior lienholder will be compelled, in equity, to exhaust such fund before he proceeds to subject the property on which the other creditor has his lien.

“If, after bill filed by the subsequent lienholder to compel such subrogation, the prior lienholder delivers up his claim on the second fund, to the debtor, he will be compelled, as between him and the subsequent lienholder, to account for such fund as so much paid on his claim.”

Now here, on May 5th, Palmer had his decree on his first mortgage for his debt. He levied by execution upon the personal property here in question. The bank had a second lien, by mortgage upon the real estate covered by Palmer's mortgage, but it had no lien upon the personal property. As the situation then was, therefore, Palmer could have been compelled by the bank to first exhaust his levy upon the personal property on which the bank had no lien, to the relief of the bank so far as concerned the real estate upon

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which the bank had a second lien, and, under the ruling made in this case in *Fassett v. Traber*, *supra*, if after having made the levy Palmer had released or relinquished it, or wasted the personal property, he could have been compelled to account to the bank for the loss so sustained, that is to say, so far as concerned the real estate.

And in *Teaff v. Ross*, 1 Ohio St., 469, the same principle is applied, although there the controversy was between a purchaser and the mortgagee, and not between a judgment creditor and the mortgagee. The syllabus in that case is as follows:

"H. mortgaged land to T., and afterwards sold it to O., and received payment. H. informed T. of the sale, and in order to remove the incumbrance, as he was bound to do by his contract with O., he proposed to give a new note for the debt, with a mortgage on real estate to secure it, to which T. consented, and the new note and mortgage were accordingly executed and delivered, T. agreeing not to prosecute the first mortgage if the property covered by the second was sufficient to pay the debt. The property was amply sufficient, but T. neglected for sixteen months to deliver the mortgage for record, by means whereof the property was swept away under mortgages and conveyances made by H. within that period.

"Held, that under these circumstances O.'s land was discharged from the lien of the first mortgage."

Now let it be borne in mind in this action, that at the time Jennings and Berry recovered their judgment—at the time they made their levy upon this personal property subject to the levy of Palmer—that the proceedings of the bank upon its cross-petition operated under the statute as *lis pendens*, so that everything that was done in that action affecting or determining the rights of the bank as against the property proceeded against affected the attitude of Jennings and Berry precisely as though they were parties defendant. It is not necessary, where a man has instituted proceedings to subject property to sale to satisfy a lien, that he bring in all the parties who are supposed to acquire interest in the same property pending the action. That is the established doctrine, and it is placed here in the form of a statute by sec. 5055, Rev. Stat., to which we have referred. So far, therefore, as concerns the real estate and the right of the bank in that real estate, the rights of these claimants, Jennings and Berry, are affected by any judgment or decree made by the court in that proceeding *pendente lite*; it is

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precisely as though they were made parties defendant and were actually appearing in the case, so that the decree in favor of the bank upon its answer and cross-petition, which was rendered May 7, 1892, binds these parties so far as the real estate is concerned. Of course, the personal property was not brought into the case in any shape or form; but, so far as the real estate is concerned and so far as the rights of the bank in each are concerned, the decree of the court fixing and establishing the rights of the bank and granting the relief to the bank, binds Jennings and Berry just as much as if they were parties to the proceeding. Then that decree was rendered on May 7, 1892. It fixed the title and rights of all the parties in the mortgaged property, an order of sale and application of the proceeds in accordance with the findings of the court as to the rights of the parties. The sale was made. Now then, in our judgment, it is not competent for these creditors, Jennings and Berry, whether they were parties to this decree or not, it is not competent for them after the levy of May 5th, by Palmer, which created in the bank a right to have that personal property first sold and its proceeds subjected to the payment of Palmer's lien, to come in and by a subsequent levy upon their judgment displace this right of the bank to have the property so appropriated and its proceeds so applied. Here the bank, on May 7, 1892, obtained a personal judgment and a decree upon the mortgage executed along in 1888 or 1889. Mr. Palmer, upon his judgment, rendered in 18—, upon May 5th, levies upon this personal property. The moment that levy was made the right attached in the bank to require that the property should be first subjected to the payment of the Palmer judgment; and if, the right so having passed, Palmer had wasted or squandered the property, he would, nevertheless, by the law as recognized in these Ohio cases, among other authorities, have been compelled to account for the distribution of the proceeds of the sale of the real estate to the bank, the loss of which he had permitted, or the waste of which he had permitted. He could not do it after he had made the levy and secured a lien which provided a fund for the payment of this mortgage debt, which was a first lien, and the mortgage debt of the bank being a second lien, he could not prejudice the bank in that way. Now, then, can another creditor, after the rights of the bank have attached, come in and by a subsequent levy displace these rights which had attached in favor of the bank, and require that a portion of the proceeds of the personal

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property shall, in effect, be applied upon his debt by subrogating him to the original right of Palmer to have the mortgaged property subjected to the payment of his judgment and a portion of the proceeds of that mortgage applied upon his claim? We do not think it is competent. We think the reasoning of the determination of the cases cited from this encyclopedia is clearly against it.

For these reasons, the statement of which have been somewhat extended, we think the court below did not err, and that the judgment should be affirmed.

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(First Circuit—Hamilton Co.O., Circuit Court, January Term, 1895.)  
Before Cox, Smith and Swing, JJ.

McGREW v. THE VILLAGE OF ELMWOOD PLACE.

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*Burns Law—When applicable to a contract—*

A contract by a village which on its face binds it absolutely to pay a certain amount within a certain time to be ascertained thereafter, payment to be made out of the general fund, is within the Burns law, although it may have been expected that the payment would be made out of the proceeds of a street assessment, such limitation not being expressed in the contract.

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SWING, J.

We are of the opinion that the judgment of the court of common pleas should be affirmed in this case.

We regard the contract in controversy as clearly within section 2702, Revised Statutes. It was a contract between the parties whereby the village agreed to pay a certain amount of money within a certain time, to be ascertained thereafter. The amount of money was not stated in dollars and cents, but was to be ascertained by a fixed rule thereafter. The amount was to be paid by the village, as far as the contract shows, out of the general fund. It was claimed that the contract did not come within the provision of the statute, for the reason that it was to be paid out of the assessments for street improvements. It might be that the village expected to pay for the services with money so received, but there is no such limitation in the contract. The village, by its terms, is liable on this contract without regard to whether anything is received from property assessed.

The provisions of this statute, we think, are too plain and too broad to permit any such contract to be valid unless the terms of the law have been complied with, and in this case it was admitted that they were not.

Judgment affirmed, with costs.

M. G. Heintz, and Wm. E. Bundy, for Village.

W. W. Pease, contra.

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The L. S. & M. S. Ry. Co. v. Ney.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1893.)

Before Bentley, Haynes and Scribner, JJ.

THE L. S. & M. S. RY. CO. v. NEY.

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*Rules of Railroad Co.—Injury to employe in consequence of non-observance of rules, in coupling cars with hand—*

Where the rules of a Railroad Co., known to the employe, require its employes in coupling cars to use a stick, for which purpose sticks are provided by the company and would have been furnished to plaintiff if he had asked for one; and the testimony shows that the coupling in question, in making which the employe was injured, could and should have been made by the use of a stick, such employe is not entitled to recover for an injury received while attempting to make such coupling by hand, in disregard of the rules of the company.

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Error to the Court of Common Pleas of Lucas county.

BENTLEY, J.

This case is before us upon a petition in error to reverse the judgment of the court of common pleas, rendered upon a verdict returned by the jury in favor of Mr. Ney, and against the railroad company, for alleged personal injuries received by Mr. Ney about December 11, 1890, in the Lake Shore yards.

The plaintiff alleged in his petition that at the time of, and before the injury to him, he was in the employ of the defendant in the capacity of a switchman or helper; that it was his duty, under the directions of the pony conductor, to assist in switching and coupling and uncoupling cars, in making up trains for the defendant; and that on December 11, 1890, about 9 o'clock in the evening, he was engaged in that work under the orders of what is called a pony conductor in the employ of the defendant, and that he was bound to obey the orders of the conductor. "That at, or about that time the said pony conductor directed that an engine with ten freight cars should proceed in a northerly direction over the said scale track to a box car that lay near the said scale, and that said car should be coupled to the said train of cars, and taken by it from the said scale track to some other track, there to become a part of a train that was being or about to be made up." The plaintiff says, that "in obedience to said order, the engineer on the said pony engine pushed the said train of about ten cars back over the said track in a northerly direction, toward the said freight car that was standing near or on the said scale; that as the train of said cars approached the said box car, it became the duty of the said plaintiff to pass between the end

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of the said train and the said box car, and make the coupling; that he did go between the said car and said approaching train, and when the said train of cars was about to strike against the said car, he endeavored to couple the same, but failed for the reason that there was some defect in the drawbar on the north end of the northerly car of said approaching train. That when the said train struck the said box car, the said box car was driven by the concussion about a car length north of the said train on an up-grade. The said plaintiff thereupon signaled the pony conductor to hold the said train at a stand-still, in order that he might safely make the coupling when the said car returned, as it was certain to do, by reason of the down-grade. This plaintiff says that at the time he gave the signal to stop the train, the pony conductor was standing near the engine in full view of plaintiff's lamp, and saw or by the use of reasonable care might have seen, the said signal; that the engineer, in obedience to the said signal, did stop the said train; that plaintiff adjusted the drawbar by raising it and bracing it with a small piece of coal, and so adjusted it that the coupling could be made without difficulty when the said car should return, and thereupon waited for said car, and when the said car returned, as it did, on the said down-grade to the place where plaintiff was standing at the end of said train, the said plaintiff undertook to make the coupling—all of which was known, or by the use of reasonable care might have been known, to said pony conductor. And that while he was so engaged in the work of coupling the said box car to said train of cars, the said pony conductor carelessly, wrongfully, and negligently signalled the engineer on the said engine to start his said engine rapidly forward; the engineer in obedience to said signal did start the said engine rapidly forward, and thereby the said ten cars were driven rapidly and violently against the said box car that the plaintiff was endeavoring to couple to this train, whereby, without any fault on the part of this plaintiff, but entirely by the reason of the negligence of the said pony conductor in giving the said signal to the engineer to start his engine as aforesaid, plaintiff's right hand was caught between the drawbars of the two cars he was endeavoring to couple, and crushed and mangled in such a manner that the greater part of it was afterwards necessarily amputated," to his damage in the sum of \$15,000.

As has been said, the case was tried to a jury, and the questions presented to us arise upon the facts as presented



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by the bill of exceptions, there being a motion for a new trial, which was overruled, and exceptions taken. The question of the effect of this testimony, as bearing upon the issues, is presented to us, whether it afforded the jury any reasonable ground for the verdict in favor of the plaintiff.

The particular facts bearing especially upon the accident are somewhat simple. The situation of the cars is detailed in the petition, and the movements that were going on. There was testimony given to the effect that one of the cars in question was equipped with what is called an "Eames coupling apparatus", and a similar apparatus, one of the Eames couplers—drawbars—has been brought in and exhibited, for the information of the court, that we may see to what the testimony applies. There was some confusion in the testimony as to where this Eames coupler was—that is, whether it was upon the end of the car which was already attached to the engine—one of the ten cars that were being moved by the engine—or whether it was attached to the stationary car to which these cars were to be coupled. There seemed to be more or less confusion all the way through the case, in the examinations at least, as to what the fact was, and there seems to be a controversy between the attorneys even now as to what the real fact was. But there was, substantially, a conflict of testimony regarding this matter. The testimony given on behalf of the plaintiff, and by the plaintiff, was finally, we think, clearly to the effect that the Eames coupler, which bore the link to be used in the particular coupling, was upon the car to which the train was to be coupled, and that the other drawbar complained of—the standard Lake Shore drawbar—was attached to the last of the ten cars already attached to the engine, and which was to be attached to this Eames coupler, the pin to be dropped in place being upon the standard Lake Shore drawbar. The testimony on behalf of the railroad company tends to show the reverse of the situation, namely: that the Eames drawbar was attached to the last of the ten cars already attached to the engine, and not upon the other car. Although some argument was founded upon that, there is substantially a conflict of testimony in the matter, and it would be utterly impossible for this court, were we so disposed, to say from this record as to which party was in the right as to this fact. But in our view of the case it makes no substantial difference whether this Eames drawbar was upon one of those cars or the other. The real controversy in the case arises over another question.

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The controversy of fact which was presented between the plaintiff's proof and that of the defendant was over the question whether the signal to go ahead, complained of in the petition, was given by the plaintiff himself or by the pcny conductor, to the engineer. There seems to be no question but that the engineer received a signal from somebody to go ahead, and obeyed it, starting the cars, according to all of the testimony on both sides, very slowly, but starting them. The plaintiff says in his petition, and also in his evidence given upon the trial, that when the cars first came together and he endeavored to make the coupling, he discovered that the Eames drawbar was from an inch and half to two inches higher than the other drawbar, so that the link did not readily enter and that by the first impact of the ten cars upon the stationary car, the stationary car was driven to the north, and thereupon the plaintiff got a piece of coal, raised up the drawbar of the standard Lake Shore car, and, as he says in his petition, "so adjusted it that the coupling could be made without difficulty when the said cars should return." His petition says that that was the situation of affairs at the time the last attempt to couple was made, viz: that he had so adjusted the Lake Shore drawbar that it was upon the same plane as the other, and the coupling could be made without difficulty. He says in his testimony that that was true.

There is no question made that there was a defect in either of these drawbars. The simple fact was that one was from an inch and a half to two inches lower than the other; but that was frequently the case, perhaps, with different cars that go to make up a train.

The plaintiff says that when this stationary car had thus been driven back, and he had adjusted this drawbar so that the coupling could be made without any difficulty, instead of holding the train still, and allowing him to wait for the return of that car, on account of the down-grade, and to make the coupling in that way, the engine started northerly towards the car which had thus been driven up the track, and that this movement occurred just about the time that the car had returned and he was actually manipulating the link to make the coupling, and that thereupon the heads of the drawbars coming together quicker than he anticipated, his hand being in there, it was caught and crushed.

The negligence which the plaintiff complains of against the defendant is simply in starting this train in that way, under those circumstances. The defendant claims, in ad-

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dition to its claim that the conductor gave no signal, that Ney himself had given the signal, and that the train was backing all the while in obedience to his signal; that the man was guilty of misconduct and negligence himself, in this: when he was employed by the company, he received a printed copy of the rules together with certain instructions therein; that he had them in his possession, and that he was aware of their contents. One rule required the switchman, or any person attempting to couple cars, to do it with a stick, and not to use the hand for the purpose of guiding the link except in cases where it was necessary—that is, in cases, as the rule says, where a stick could not be used for the purpose. The plaintiff testified that he had received and knew of that rule; that he didn't use a stick; that he did use his hand, and that the injury occurred substantially as we have said. The company gave testimony, and it was not disputed, so far as that fact goes, that sticks were prepared for this use, which he might have obtained and used; that the rule required him to furnish himself with a stick, yet the company furnished it; all he had to do was to go and get it. He attempted to give testimony several times to the effect that although this rule was nominally a rule of the company, yet the rule was not in force; that it was not the habit of brakemen generally to use a stick; that the coupling was almost uniformly made by the hand in the presence of the officers and superior agents of the company; and that thereby the rule should not be allowed to figure in determining this case, or in determining the character of his action in using his hand. Whether right or wrong, as the questions were presented at various times during the trial, the court of common pleas uniformly excluded that testimony, and it was not given. So that the question finally presented to the jury rested upon the general facts of the case, with that rule in force, and with the confession of the plaintiff that he did not use his stick, but that he used his hand.

It will be seen, then, that the real question—the final controversy which the jury were called upon to decide, in view of the charge of the court upon the effect of that rule, was, whether or not that was an occasion where this rule required the use of the stick or not; or perhaps, to state it a little more liberally: this was given to the jury as a question of fact whether or not, in the exercise of reasonable judgment upon the part of the switchman, when he was attempting that coupling, in view of the situation and circumstances, he should have been required to use his hand, or

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whether it was an occasion where he should not use his hand, but should use a stick. The jury found that it was proper for him to use his hand, apparently—that is necessarily the conclusion from their verdict; and the question presented to us is, whether they had a right to so find from this testimony.

The plaintiff says in his testimony, upon pages four and five, in answer to questions:

“Go on and tell the jury just what you did. A. I went back and made the three couplings, and came to this Eames coupling. The car stood about three car lengths south of the scale track. I tried twice to couple it, but couldn't make it. I put a little lump of coal under the drawbar, and could make the coupling all right. The track kind of descends down, kind of step down on a small slope like—went in and put a little lump under there, and set the pin.

“Q. When you gave them a signal to stop, what happened? A. It brought them right to a stand-still, and stopped.

“Q. Was it after they stopped that you put in this piece of coal, or before? A. I had the lump of coal before he stopped. The car came moving along down. I made the coupling all right. Just as I went to pick up the link to enter into the drawbar, the engine came ahead on me, and caught me.”

I have marked in the record the testimony bearing upon this matter—the necessity of using the hand on such an occasion as here presented. Perhaps I ought not to take the time now to turn to that, but to state substantially all the proof upon that subject. The defendant had various witnesses who testified that the coupling could be made with a stick. The plaintiff had some one or two, possibly three, witnesses, who gave testimony upon this subject, and in the course of their testimony they said substantially, one could not couple an Eames drawbar or link with a stick. Upon inquiry as to why that could not be done, they simply gave this reason: that where the drawbar of the other car, into which the link was to be entered was from one and a half to two inches higher than the Eames drawbar, the link, or bull-tongue, as it is called, is so heavy that a person could not raise it sufficiently with a stick in his hand, but must take it in his hand to raise it to the same plane, so it would enter. It was proven, substantially without any contradiction, and by witnesses on both sides, that where it was simply necessary to depress the link of the Eames drawbar, it could be depressed three or four inches by a pressure upon the top of it; that generally it was supposed to be

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almost on a poise, but the back end being a little heavier, it was not quite on a poise, but that a slight pressure upon the top of the link would depress it three or four inches. And this is illustrated by what has been brought here, that that can be done very readily and very easily, upon a very slight pressure. There was no suggestion by anybody that there was any difficulty in making a coupling where the drawbars were substantially upon the same plane; there was no suggestion of any difficulty sometimes occurring where one of the drawbars was on one side of the other—where they didn't come face to face; the only suggestion of difficulty is, when, not the Eames drawbar, but the other, is an inch and a half to two inches higher than the other. Where the Eames drawbar is the higher, if they had not been brought to the same plane, the proof is, that by a slight pressure even by a stick or anything, the Eames drawbar could have been depressed, and the entry could have been made. But even that situation is not placed before us in this record, for when the accident occurred, and the coupling was about to be made, it is the undisputed proof—the claim of the plaintiff in his petition and in his testimony—that the drawbars were upon the same plane, and that the coupling could be made without any difficulty whatever. There is the situation: the coupling could be made without any difficulty whatever, and without danger, by the use of a stick. The stick could have been used. The plaintiff knew of the rule, and he chose to disobey it. In those circumstances we see no escape from the conclusion that the jury were not warranted in finding that the defendant was not called upon to use a stick, and that it was perfectly right for him to use his hand. And it being perfectly manifest that the accident occurred simply because he did use his hand, and not a stick, we are compelled to say that the verdict is not sustained by the evidence. There is not a conflict of evidence, but the concurring testimony of all persons upon the facts that bear upon the real controversy shows that the verdict is not sustained. In deciding this we do not mean to say that the rulings which the court made against the plaintiff as to the admission of testimony about using a stick or using the hands were right or wrong. Whatever testimony might have been given upon that subject was excluded by the court. We decide the case upon the record as it is here presented to us.

This verdict will therefore be set aside, and the judgment reversed, and the cause remanded to the court of common pleas for a new trial.

Judgment against the defendant in error for costs on error.

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Ames v. The Wheeling & Lake Erie Ry. Co. et al.

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(Sixth Circuit—Sandusky Co., O., Circuit Court.)

Before Bentley, Haynes and Scribner, JJ.

J. L. AMES v. THE WHEELING & LAKE ERIE RY. CO. et al

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*Sale of right of way to R. R. Co.—Vendor's lien good as against subsequent purchasers—*

(1.) Plaintiff had entered into an agreement with the Railroad Co., to avoid the vexation of legal proceedings, to convey to them the right of way through his land at a certain price per acre, he agreeing to take such purchase money in shares of the capital stock of the Railroad Co. if the same should at the end of two years be worth its face value, otherwise to be paid in cash. The stock being of no value at the end of two years, he demanded the cash, which was refused, and suit brought to enforce vendor's lien. Held, that plaintiff is entitled to a vendor's lien, and to enforce the same as against subsequent purchasers of the road under foreclosure proceedings to which he was not a party.

*Same—Order for sale of entire road proper—*

(2.) To enforce the vendors lien, the proper remedy is an order of sale of the railroad as an entirety. (Railroad Co. v. Lewton, 20 Ohio St., 401.)

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Appeal from the Court of Common Pleas of Sandusky county.

HAYNES, J.

In the case of J. L. Ames, plaintiff, v. The Wheeling & Lake Erie Railway Co., defendant, coming into this court upon appeal, sundry pleadings were filed and leave finally taken to file an amended petition, and the case has been heard on what is called the second amended petition and the answers thereto. At the time of the filing of that petition, the Mercantile Trust Co. was made a party, and also filed an answer.

The plaintiff in his petition sets forth: That the defendant railway company is a corporation duly incorporated under the laws of Ohio and owns and operates a line of railroad running from the county of Belmont, Ohio, to the county of Lucas, Ohio, and gives a description of the line. It really runs from the city of Toledo to a point opposite Wheeling in Belmont county. The petition sets forth further, that "At the September term, 1885, of the court of common pleas of Sandusky county, Ohio, beginning September 14th, the plaintiff, by the consideration of said court duly recovered a judgment against the railroad company, in the sum of \$1,127.18, debt, and \$41.90 costs," and that he had by virtue of said judgment a valid lien on said line of railroad, and further, a vendor's lien, as found by that court, to secure the payment of said sum. He further sets up that at



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the February term, 1886, of the circuit court of this county, said judgment and decree was affirmed by that court. He sets forth further, that the railway company purchased the said line of railroad, right of way, depots and platforms and other structures on the same on or about June 27, 1886, and that they purchased said property with notice of plaintiff's judgment and liens thereon, and hold the same subject to plaintiff's prior liens thereon. He further says that the trust company, which is a corporation duly incorporated under the laws of New York, claim an interest in or a lien upon said line of railroad and right of way, depots, platforms and other structures on the same; that plaintiff's said liens are the first and best liens, and prior to the lien of the trust company.

The defendant, the railway company, filed an answer, in which they admit that the plaintiff recovered a judgment at the September term, 1885, against the company for the amount alleged in the petition, "but it denies that the plaintiff has, by virtue of said judgment, or otherwise, any lien whatever," as alleged.

It then sets forth that on November 1, 1879, the railroad company executed its first mortgage bonds and sold them, and to secure the same, on November 1, 1879, executed a mortgage to the Farmers' Loan & Trust Co., as trustee upon its line of railroad, and all its appurtenances and equipment and everything belonging to it; that said mortgage was duly recorded during the year 1880, and sets forth the conditions of defeasance. The amount of the bonds was quite large, some \$8,500,000, I believe. That the railroad company failed to pay the interest which became due November 1, 1883, and on July 3, 1884, the trust company filed a bill in the circuit court of the United States for the northern district of Ohio, against said railroad company, and that such proceedings were had that a sale was made of the property by the special master commissioner, to Forest, Day and Garrison, as trustees; said sale was confirmed, and deed made by Goodspeed, Commissioner, to said trustees. That said deed was recorded. That afterwards, on June 25, 1886, said trustees deeded said property to the railway company. The defendant therefore admits the purchase of said railroad by the defendant, but denies that it made said purchase with notice of plaintiff's judgment and liens, or that it holds the property subject to any lien of plaintiff.

In reply to that, the plaintiff says that the mortgage given to the trust company was foreclosed and under the proceed-

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ings in the circuit court of the United States, set out in the answer of the railway company, has ceased to be a lien upon the property of the said railway company. I may say in this connection that it appears that the plaintiff was not made a party to that suit. It is not averred that he was, nor is it denied. The railway company further answering to the amended petition, by an amendment to its answer, sets up that there are sundry liens, one in favor of the Central Trust Co., of New York, given by the railway company April, 1888, for three millions of dollars; it declares that it is still a subsisting lien upon defendant's railroad. The mortgage given by the railroad company is dated March 1st, I suppose of the same year, and is a lien for \$2,800,000. That is the original mortgage I think. It further sets up that there are divers judgments rendered against them in different counties along the line of the road, and one of them I think in this county.

The plaintiff replies and says that there are no liens upon the tract of land sold by the plaintiff to the railroad company prior to the vendor's lien, and he has no knowledge of the other matters and things set forth, and denies them.

The Mercantile Trust Co. sets up its mortgage as executed on July 1, 1886, afterwards recorded in August, 1886, and prays that in any action or proceeding in this court the rights of said defendant may be preserved, and that it may have such relief as it may be entitled to.

The case was heard upon evidence, and the evidence which was put in was principally record evidence.

Briefly, if we have the facts correctly, the evidence shows that the original mortgage was made to the Farmers' Loan and Trust Co., November 1, 1879, and was thereafter recorded in 1880, early in the winter.

Next in order, on July 15, 1881, Ames made a contract for the sale of this right of way, giving the railroad company permission to enter upon his land to construct the road, and, in 1881, September 17, he executed a deed to the railroad company. On April 17, 1884, he filed his petition to enforce his vendor's lien, and on November 7, 1885, he took his decree. Meanwhile, on July 8, 1884, the trustees filed their petition to foreclose the mortgage given to the Farmers' Loan and Trust Co., in the circuit court of the United States, and, on January 13, 1886, they took their decree. On April 23, 1886, the master commissioner, Goodspeed, sold the road to Forest, O'Day and Garrison, trustees, and on June 22, 1886, the sale was confirmed by the



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United States court, and shortly after the deed was made and recorded accordingly. On June 25, 1886, the trustees sold said premises to the railway company, and on October 7th the present action was brought in the court of common pleas of Sandusky county, Ohio.

On July 1, 1896, the railway company executed its bonds and mortgage to the Mercantile Trust Co., which was recorded in August, 1886. It further appears by the evidence introduced in the record of the first suit of Ames against the railroad company, that the suit was brought against the railroad company alone, for the purpose of enforcing a vendor's lien upon the property that had been sold by Ames to the railroad company. It further appears in the record that Ames, on July 15, 1881, executed a paper to the railroad company wherein and whereby it was agreed that in consideration of one dollar and the desire to avoid vexatious legal proceedings the railroad company might locate and construct its road on plaintiff's premises describing them, sixty-six feet wide, on the line surveyed just north of the Lake Shore and Michigan Southern Railroad's right of way, the consideration for said land to be two hundred dollars per acre payable in the capital stock of said company, said stock to be worth par at the end of two years or said price of said land to be paid for in cash. Afterwards, on September 1st, in the same year, being a month and two days afterwards, Ames and wife executed a deed to the railroad company conveying to them that strip of land, naming the consideration as one thousand dollars in stock of the defendant company, and containing the other conditions mentioned as being in the paper just referred to. At the expiration of two years, it is averred that the stock was of no value; that he tendered to the railroad company the stock and demanded the amount in cash that the company had agreed to pay for the land, and it was refused, and thereupon suit was brought and such steps taken in the case that a decree was rendered in the court of common pleas, the decree finding that there was due to the plaintiff on account of the matters and things alleged the sum of \$1,000, with interest at six per cent. from September 25, 1883, and that the plaintiff was entitled to a lien amounting in all to \$1,127.18, and that said sum should be declared a lien on defendant's line of railroad and right of way through Ohio. To this finding and judgment the defendant duly excepted.

That case was taken upon error to the circuit court of this county, and at the February term, 1886, was affirmed

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Since that time the supreme court affirmed it at length without report, and we understand that a petition in error has been filed and the case is now pending in the supreme court of this state.

The records have been offered also of the mortgages to Forest, O'Day and Garrison and to the Mercantile Trust Co.; the deed of the master commissioner, Goodspeed, of the road to the railway company; the original bill of complaint in the United States circuit court and the decree in the United States circuit court.

Upon this state of facts it will be seen that, as between the plaintiff and the defendant railroad company, the question of the right of the plaintiff to recover and have a lien has been settled by decision of the court of common pleas of this county and affirmed by the circuit court of this county. In that suit, however, as I have already stated, no other parties were made except the railroad company.

Upon this state of facts, the defendants make two questions here as to the right of the plaintiff to have this vendor's lien upon this right of way or upon his land covered by the right of way, and also his right to have an order for the sale of the property of the railway company. They also make another question: That the proper parties have not been made to the suit.

Now, to take these in their order—as to the right of the plaintiff to maintain his action for an order of sale of the property of the company for the enforcement of the vendor's lien in this case, we think the question is practically settled by the case of Railroad Co. v. Lewton, 20 Ohio St., 401, decided by the supreme court of this state, being a case that went up from the superior court of Montgomery county.

It will be necessary, in order to have an understanding of this matter, that I read this case, and, in passing through the reading of it, to show the distinctions and the application of the case to the one at bar.

In that case the defendant, Lewton, being the owner of the farm, entered into a contract with the Dayton, Xenia and Belpre Railroad Company, in the year 1858, whereby he agreed "to release to the said railroad company the right of way and the right to enter upon and construct their road through the following lands" (describing them). And "for and in consideration of the right of way, and the right to enter upon and construct said railroad, the said railroad company agree to pay to the said Henry Lewton the sum of fifteen hundred dollars, as follows, viz: one-third, \$500, on

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or before commencing work on said lands; one-third, \$500, in two years after the payment of the first payment, with interest; and also to make a road crossing and two cattle guards at or near station 600, and one cattle guard at the west end of said farm, and also to make a culvert or bridge crossing at a branch at station 615 large enough for wagon track." Those are the material points so far as this case is concerned. No deed was ever made for the right of way to the railroad company. The railroad company entered upon the lands of the plaintiff under that agreement and constructed its railroad. "In November 1857"—which would be four years afterwards—"the defendant in error recovered a judgment against the railroad company for a balance of the purchase money. And in March, 1858, in the same action, a further judgment for \$500 for the failure of said company to construct its road in the manner provided in the contract." (That is to say, I suppose, the cattle guards and culverts or bridges, as the company had agreed to do.) "These judgments have never been paid. The said right of way has not been conveyed otherwise than by said instrument. In January, 1855," (nearly two years before the suit was commenced) "said railroad company executed a mortgage on said railroad to plaintiff in error, Charles W. Rockwell, trustee, to secure the payment of five hundred bonds for \$1,000 each. Rockwell at the time had no actual notice that plaintiff's claim had not been paid." (The company had taken possession in 1853, and executed this mortgage in 1855.) "In October, 1865, Rockwell obtained a decree upon said mortgage for the sale of the railroad; and in January, 1866, the same was sold on said decree to the Little Miami and Columbus and Xenia railroad companies (also plaintiffs in error) for a sum of money insufficient to discharge the mortgage liens. This sale was confirmed and the purchasers put in possession."

"The defendant in error was not a party to said action to foreclose, nor had he any actual knowledge of the pendency of the action." (In that respect, he stood in the same position that Ames stands in relation to the Wheeling and Lake Erie Railway—the only practical difference, so far, is that Ames had made a deed while Lewton had not.)

"In April, 1868, the defendant in error obtained a decree of the amount due him on said judgment, and in default of such payment, for the sale of said railroad, with its rights, privileges and franchises for the purpose of satisfying said judgment. In this decree, or prior thereto, the court did

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not find the amount due on said mortgage, nor settle any questions of priority, etc." (April '68, was after the execution of the mortgage—three years—and after the sale to the Little Miami Railroad.) "This is the judgment or decree sought to be reversed in this proceeding. The several errors assigned by plaintiff in error may be embraced in this general question—Did the court below err in rendering said decree upon the foregoing state of facts? Several propositions, however, are embraced and must be answered separately.

"1. Was the defendant in error entitled to the relief decreed to him? What is the nature of the case made by him? The property ordered to be sold includes an easement of the right of way of the Dayton, Xenia and Belpre Railroad, over the lands of the defendant in error; and his claim, in part at least, was for unpaid purchase money for that easement. A purchaser of realty ought not to enjoy the estate purchased without paying for it; therefore, in equity, the vendor has a lien upon the property sold for the payment of the purchase money." (The legal title having been conveyed by Ames, he would come technically under what is called a vendor's lien.) "It may be that this equity of the defendant in error is not technically what is called a 'vendor's lien,' inasmuch as the legal title has not been conveyed by him to the purchaser. It is, however, at least, as strong a hold upon the property sold as the lien of a vendor after title conveyed; for here not only is an equity retained by the vendor in the property sold to the extent of the unpaid purchase money, but the legal title is also retained by him as additional security.

"It cannot be said in that case, 'that, from the nature and objects of this sale, the vendor did not intend to rely upon the thing sold as security for his payment.' Retaining the legal title is very strong if not conclusive evidence that he did intend to rely upon it as security. The presumption, however, in all cases, even where the vendor conveys the legal title, is, that he intends to rely upon the property sold as security. And before his abandonment or waiver of such security can be found it must be shown that he did not intend to rely upon it.

"Nor will it do to say that 'the difficulty in determining the priorities of such liens, or in executing decrees in such cases,' is evidence of an intention of the vendor to waive his lien. If such a lien can be enforced at all, the presumption that the vendor intended to rely upon it is not weaken-

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ed by the difficulties in the way, and if a court of chancery could find no means of adjusting co-existing liens or equities of this kind, or of enforcing the sale of such property to satisfy them, the only inference would be, that the vendor has been disappointed in his expectations. But whether a court of equity has power to decree and means to execute its decrees in such cases, are the ultimate questions in this case and not preliminary ones, the solution of which may aid us in working out a conclusion." (That is to say—he has his right of lien, and the question whether it can be worked out, or not, is a question for the court afterwards.)

"We can see no insurmountable difficulties in sustaining and executing the decree in this case, whether it be regarded as a decree enforcing a specific lien upon the property, or a decree compelling the specific performance of the contract.

"2. That a vendor's lien is applicable to the sale of an easement in land is not in terms denied by counsel for plaintiffs in error, and we see no good reason why such a lien may not attach against an easement as well as any other interest in land.

"3. The judgment for damages for not constructing the road in the manner provided for in the contract, is as much the price of the interest sold to the railroad company, as was the \$1,500 agreed to be paid in money. The only difference is that the amount of cash was ascertained and agreed upon by the parties, while the amount of the damages was not ascertained until judgment. Both sums arose in contract, and constituted the compensation the vendee was to return to the vendor for the interest purchased.

"4. Having found the amount of purchase money due the plaintiff below, as a predicate for the decree of sale, in default of the payment thereof, it was not error in the court below to decree the sale before finding the amount due upon the mortgage lien of Rockwell and determine the priority of the liens. In such matters there is a discretion in the court, and we cannot say that such discretion was abused in this case.

"5. The defense by Rockwell, the Little Miami and Columbus and Xenia railroad companies that they are innocent purchasers for a valuable consideration, and without notice of the right of the defendant in error, cannot avail them.

"The fact that defendant in error retained the legal title to the right of way sold, was sufficient to put them upon inquiry. They and each of them had constructive notice of the legal title. And had they, as prudent persons, made the

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inquiry as suggested by the state of the legal title, they would have come to the knowledge of the rights of the defendant in error.

"6. The defendant in error was in no wise affected by the sale under the mortgage. He was not a party to that suit.

"7. The last question we propose to consider is one of greater difficulty.

"The court below decreed the sale of the whole of the Dayton, Xenia and Belpre Railroad (which at the time was being used as a public highway) to satisfy a specific lien of the defendant in error upon a section of the right of way. Is such decree erroneous?" (When they say it was used as a public highway, we of course understand it that it was used for a railroad.)

"The rights of the public must not be ignored; and it is the right of the public that this highway be maintained. It was by and through the exercise of its power of eminent domain that it was established. And we take it that the right of the public to maintain the highway is paramount to the right of the defendant in error to destroy it. To sell the section of the right of way over the lands of the defendant in error, and separate its use from the line of the road would destroy the highway. Hence to have decreed a sale of this fraction of the road or right of way, would have been erroneous. The public having delegated to the Dayton, Xenia and Belpre Railroad Co. the power to exercise the right of eminent domain in the establishment of this highway, the company had power to obtain the right of way for its road in two modes—by condemnation and prepayment of compensation under the right of eminent domain, or by contract with the owners of the land, upon such terms as might be agreed upon. In Lewton's case the latter mode was resorted to, and, by the terms of the contract, a right to enter upon the land and construct the road before the payment of compensation was secured; and yet that compensation was secured to Lewton by an equitable lien upon the easement thus obtained by the company. And justice requires that this security shall be applied to the satisfaction of Lewton's claim. Can it be done? The difficulty is apparent rather than real. The public has and can have no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. And this right is well subserved, if the ownership and management of the highway be in the hands of one party as another. Hence the



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public has no interest impaired by a sale of the whole line.

"We have seen that the Little Miami, and Columbus and Xenia Railroad Companies and Rockwell, stand in the shoes of the Dayton, Xenia and Belpre Railroad Co. And what shall be said of the rights of the latter? Has it a right to retain the property of the defendant in error without paying for it?

"Having obtained the possession of this property from the defendant in error, under a promise to pay for it, the Dayton, Xenia and Belpre Railroad Co. may not so blend and mix it with other property of its own as to constitute a great and indivisible highway, and then be permitted in equity to say to the defendant in error, 'this property upon which you had and have a specific lien, had become, by my act, a part of a highway which the public has an interest in maintaining, and because the withdrawal of your part from the common use would defeat the public right, therefore you may not enforce your lien.'

"On the other hand, because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree the sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights and interests of other parties, either as owners or lien-holders upon the road, can be protected and their property or security saved from absolute destruction.

"The doctrine of this case is supported by *Walker v. Railway Co.*, 12 Jurist, N. S. pt. 1, page 18. See also 2 Story on Equity Jurisdiction, by Redfield, 460, and 88 Vermont, 811." The justices concurred.

Now, is there anything in the case at bar that should take it out of the doctrine laid down by the supreme court in the case which I have just read? There are some points of difference in the two cases. First, as I have already said, the legal title had been conveyed by Ames to the railroad company; but it has been held by this court, as formerly constituted, that that purchase price was a vendor's lien, or that the plaintiff had a lien in the nature of a vendor's lien, or a vendor's lien properly—upon the land so sold, and with that judgment, under the authorities and under the authorities in this case, we are satisfied. We think there should be no question that Ames has the right to enforce his vendor's

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lien upon the premises that he conveyed to the railroad company.

The point is made that because in the deed there was a provision made that the stock should be worth a certain sum in the period of two years, that that became simply a personal covenant on the part of the railroad company; but we think upon the contract of sale and upon the deed made under that contract of sale, that the company had agreed to pay the sum of one thousand dollars—or whatever the sum named is—when the deed was made; that it had the right to and under the contract did turn out certain stock, but it was the agreement in substance between the parties that he was to have the twelve hundred dollars; the stock was taken, and if that was worth the face of it at the end of two years, that was to be in satisfaction of the consideration paid, and if not, then their obligation should still remain to pay the sum they agreed to pay for the land, and that the plaintiff had the right, under the principles of law laid down, to look to his lien upon the land for his payment and that it devolved upon the railroad company, as stated in *Railroad Co. v. Lewton*, supra, to show that he did not intend to rely upon that and allow the company to have his land exempt from the vendor's lien. Having this vendor's lien upon the land he had sold, the question is whether or not that lien has been cut off by any proceedings had in the case.

It appears that the first mortgage made upon the property was made almost immediately upon the laying out of the line; it was made before the railroad company had obtained this right of way, either by contract or by deed; and the question is made here whether or not, having purchased the land, it should not have passed under the mortgage in such a manner that the property would be exempt in the hands of the mortgagee and the purchaser under him, from a vendor's lien.

We are very clearly of the opinion that the mortgagee in that case stood in the shoes of the Wheeling and Lake Erie Railroad Co.; that when the deed was taken to that land it was taken subject to this vendor's lien; that the person who held the prior mortgage had no greater interest or right in the property than the Wheeling and Lake Erie Railroad Co., and as the railroad company held it subject to the vendor's lien, the mortgagee held it in the same manner.

Ames was not made a party to the proceeding for sale under that mortgage, and his rights were not cut off by it. He stood in the same position as if a sale had not been made.

It is said also that the railway company when they became the purchasers of the property took the property free



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from the vendor's lien upon the property; but the parties who made that purchase made it after the original suit was brought against the railroad company to enforce the vendor's lien; that matter was a matter pending at that time between plaintiff and the railroad company, and it was bound in making its purchase to know what the rights of the plaintiff were under that decree. We think it was bound also by the deeds which had been filed to know that in case the consideration was not paid, the plaintiff would have a vendor's lien upon the property, and that the Wheeling and Lake Erie Railway Co., without question, took the land subject to the vendors' lien of the plaintiff.

Discussion has been had as to how far the plaintiff should have a lien upon this railway company. We think there can be no question under this decision in *Railroad Co. v. Lewton*, supra, that the plaintiff is entitled to a decree for the sale of the right of way of the company, and that that sale would cover whatever rights the railway company have in the right of way.

In speaking of this vendor's lien, so far as this court is concerned, we shall make the vendor's lien applicable only to the property conveyed to the railroad company by Ames; but, in order to enforce that lien, under the principles laid down in *Railroad Co. v. Lewton*, supra, and as a matter of necessity, an order must be taken for the sale of the whole of the right of way of the road, and so far as that is concerned, a decree will be taken for the amount due and an order of that kind entered.

A second question has been made as to the parties to this suit. It will be seen that in making this decree we do not find the amount that is due to the Mercantile Trust Company. It is also claimed that there are some persons who have—perhaps in this county—some judgments said to be liens upon portions of the road. Under the authority of the decision in *Railroad Co. v. Lewton*, supra, we do not deem it necessary to find the amount that may be due to the Mercantile Trust Company, or to any other persons who are lienholders at this time. The sale will be made and the money brought into court with the right reserved to the Mercantile Trust Company to find the amount due to it and to marshal the respective liens of the parties. If parties have judgments, they may be brought in and made parties to the suit prior to the time when the respective rights of the parties to the suit are settled.

A decree may be entered in accordance with the suggestions that have been made.

*Richards & Heffner*, for Plaintiffs. *J.M. Lemmon*, for Ry. Co.

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Gladieux v. The St. Louis Parish of Toledo.

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(Sixth Circuit —Lucas Co., O., Circuit Court.)

Before Haynes, Scribner and Parker, JJ.

VICTOR GLADIEUX v. THE ST. LOUIS PARISH, OF TOLEDO,  
OHIO.

*Action at law—Cross-petition setting up equitable cause of action—Right to appeal—*

- (1). Where plaintiff brings an action to recover balance due on a building contract, and defendant in its answer admits some of the allegations of the petition and denies others, and by way of cross-petition asks for reformation of the contract and for damages for non-compliance with its terms, and the case is tried to a jury and a verdict rendered for the plaintiff, the defendant will have a right to appeal the case on the equitable cause of action set up in its cross-petition. But the appeal would not open up the law matter that was submitted to be tried by a jury; if the appeal takes up anything, it takes up only the equitable matters outside of the law claims which have been submitted and tried.

*Equitable cause of action insufficiently set out—Right to amend in appellate court—*

- (2). A party may set out an equitable cause of action in his petition or in his cross-petition; and if he fail to insert all the material allegations essential to such cause of action, nevertheless, if the complaint be of an equitable nature, he may appeal and in an appellate court obtain further leave to amend and perfect the allegations of his petition.

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SCRIBNER, J.

The case of Victor Gladieux against the St. Louis Parish of Toledo, Ohio, et al., is before us on motion submitted by the plaintiff to dismiss the appeal in this court by the defendants.

The action below was brought upon a building contract entered into between the church and the plaintiff for the erection of a certain structure described in the petition.

The plaintiff avers his full performance of the contract, and alleges the contract price of four thousand dollars, of which three thousand dollars have been paid, leaving still due a thousand dollars; also the sum of \$19.85, which is alleged as due to the plaintiff for building a sidewalk, according to the agreement entered into between the parties.

The defendants, answering in the case, set out certain admissions of some of the immaterial allegations of the petition, but deny all the other allegations not specially admitted.

Then, by way of cross-petition, and further answering to the petition, the defendants say, that on or about July 22, 1892, they entered into a contract in writing with the plain-

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tiff in this case for the erection and completion of a two-story brick residence on the real estate in the petition described for the agreed sum of four thousand dollars and according to specifications and plans referred to in the written contract, of which a true copy is hereto attached and made part thereof, marked "Exhibit One."

Defendants further say that there was drawn up by said plaintiff, or his amanuensis, and that it was a part of said contract to be reduced to writing, that the plaintiff should forfeit the sum of two dollars per day for each and every day after October 15, that said house should remain unfinished and uncompleted; and that said plaintiff, for the purpose of deceiving said defendants, omitted or caused to be omitted from said written contract the agreed provision or condition to finish said contract work by October 15, 1892. under a forfeiture of two dollars for each and every day thereafter.

These answering defendants say that plaintiff agreed to finish said building on or before October 15, 1892, under a penalty as aforesaid and that he failed to finish the building and the same is not completed, all to their damage in the sum of \$450.

Defendants further say that the plaintiff agreed to construct said house in a workmanlike manner, according to specifications here annexed, but that, in disregard of his said obligation, under the directions of said specifications, he has failed and refused to comply with the same in his: And then there are pointed out numerous imperfections and failures of performance on the part of the plaintiff, as is claimed by the defendants, to the number of 17—more than 17 in number in point of fact. And in many other regards plaintiff has failed to comply with the said plans and specifications of the contract, all to the damage of the defendants in the sum of \$600. Wherefore these answering defendants pray that said contract in said petition set forth and thereto annexed be reformed as to the provision for the penalty of two dollars a day for failure to complete the building by October 15, 1892, and for judgment against the plaintiff in the sum of \$1050, and of their costs herein expended.

The plaintiff replies denying the allegations of the answer, especially the allegation of fraud in the omission of some of the alleged stipulations—as to the stipulated damage for default in the completion of the work; also the allegation relating to the imperfections in the work.

Upon these pleadings the case went to trial before the court of common pleas and a jury having been empaneled to

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try the issues entered into or made up between the parties.

The jury found a verdict for the plaintiff for the substantial amount of his claim. Thereupon the court made an entry in which this language appears: "And thereupon in accordance with the verdict of the jury duly rendered in this action the court find there is now due (so much money) and rendered judgment thereon."

A bond to perfect appeal having been filed, it was duly transferred to the clerk of this court, and the plaintiff filed his motion to dismiss appeal on the ground that the case is one in which neither party was entitled to demand a trial by jury; that a jury was demanded to try the case, and that therefore neither party has a right to appeal. It is upon that motion that the case has been heard.

As I have stated, the plaintiff does not demand personal judgment in the case. He sets up the fact constituting his claim against the defendants, and the petition proceeds: "Wherefore, plaintiff prays that an account may be taken of the amount due him upon said claim, and that the same may be declared a first lien on said lot, and that the liens thereon may be marshalled and said lot sold, and his said claim with interest thereon paid from the proceeds of said sale, and for such other and further relief as he may be entitled to," etc.

Manifestly there is here no claim for personal judgment; nothing which would entitle the plaintiff to demand a trial by jury.

The answer, as has been shown, alleges fraudulent conduct on the part of the plaintiff, taking issue with certain allegations in the petition as to the performance of work. The defendant alleges that the plaintiff perpetrated a fraud upon the defendants in this: That the contract was drawn by plaintiff; that it was a part of the contract and was to be reduced to writing, that said plaintiff was to pay to these defendants the sum of two dollars per day for each and every day after October 15, 1892, that said house should remain unfinished and uncompleted; and that said plaintiff purposely, and to deceive these defendants, omitted or caused to be omitted from said contract the agreed provision or condition to finish said contract work by October 15, 1892, under penalty an forfeiture of two dollars per day for each and every day of delay after that time. And the defendants allege damage to the extent of some \$450.

Now, it appears by the ruling of the supreme court in the case of *Ellsworth v. Holcomb*, 28 Ohio St., 66—at least it

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was referred to in the argument, that pleadings containing allegations of that kind, if the facts are sufficient to make a case of fraud, or present such a cause of action within the original or any cross-petition, it is appealable to the appellate court.

In the case of *Ellsworth v. Holcomb*, supra, the first paragraph of the syllabus reads as follows:

"Where a plaintiff brings an action for the reformation of a written contract, and at the same time asks for a money judgment, to which he would be entitled only in the event of his obtaining the equitable relief sought; and the only issue of fact made by the pleadings is on the right to such equitable relief, neither party has a right to demand that such issue shall be tried by a jury."

Here the defendants in their cross-petition pray for a reformation of the contract in the particular which I have referred to, and they ask that judgment may be rendered upon the contract as reformed and the damages they have sustained in consequence of the failure, as alleged by them, on the part of the plaintiff to comply with the terms of the contract in the particular there complained of, and the allegations of the cross-petition in this regard are not sufficient to make a case clearly, it seems to us, and under the ruling of the court in the case of *Ellsworth v. Holcomb*, supra, the parties defendant would have the right to appeal from the judgment or finding against them as the issue was made here in regard to this particular matter complained of.

It is quite questionable whether or not the facts alleged in this cross-petition in this regard are sufficient to make a case. It is alleged that the cross-petitioners were ignorant of the fact that this omission was made and that the plaintiff failed to insert the provision which was agreed upon and in some other respects the petition seems to be somewhat defective in that regard; but we do not think that these omissions or defects would deprive a party of his right to appeal.

A man may set out or undertake to set out an equitable cause of action in his petition or in his cross-petition; he may fail to insert all the material allegations that are essential to such cause of action; nevertheless, if the complaint be of an equitable nature, he may appeal, and in an appellate court obtain further leave to amend and perfect the allegations of his petition.

This appears in the ruling of the court found in the case of *Grant, etc., v. Ludlow's Admr. et al.*, 8 Ohio St., 1, 81, 82, where the court say:

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"Like a cause appealed into the district court from the court of common pleas, we take up the case at the point where it stood when reserved; and, as in cases of appeal, have the same control over the subject matter of the action, the pleadings, and, if necessary, the issuing and service of process, and the final determination of the case, as the district court could have exercised, had that court retained it for final adjudication."

And further, the court say:

"But it not unfrequently happens, especially in equity cases, that facts and allegations necessary to determine the subject matter of the original cause of action, and dependent upon, and growing out of the original causes of action, have been omitted in the pleadings below, or the cause of action is imperfectly stated. Such amendments have been heretofore allowed on appeals in this state; and when the collateral facts, in equity suits, made it necessary to bring a new party before the court, it has been allowed. Such amendments are made for the purpose of settling and fully determining the cause of action appealed."

Applying this doctrine to the language of the cross-petition under consideration here, that if the allegations are not sufficiently clear to make an equitable cause for relief, that upon an amendment of the cross-petition such allegations may be supplied, if the party desires to supply them, and that if he be able to make good averments in his cross-petition in respect to the alleged fraud in omitting a material condition from the contract, he is entitled to appeal his case to the circuit court upon the allegations in his cross-petition, and the issues taken as to those allegations as to what shall be done with the case in the event that, upon the final determination, the issue made as to the fraud is left uncertain and undetermined by the court.

Then, as to the remaining part of the case—the further allegations of the answer and cross-petition are that the plaintiff has failed to perform the contract according to its terms, and that the work and materials are defective in many particulars, all to the damage of the defendants in the sum of \$600, for which judgment is prayed against the plaintiff.

At first sight, it would seem that these averments of the answer and cross-petition make an equity case or counter claim or cross action on the part of the defendant below against the plaintiff. That is to say, if the plaintiff himself were not there suing upon this contract and demanding the contract price of his work and materials, the defendants

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would be suing him upon his contract in an original action to recover damages. Of course, if issues were taken in such a case, it would indicate a cause of action for trial by jury. But it will be observed here that the plaintiff is suing for \$1,019 and some odd cents. If that amount is due, even conceding that the defendants have a cause of action as is claimed by them upon the grounds of complaint as is claimed by them upon a building contract; nevertheless, they could claim nothing beyond an insignificant sum in the way of damages because, according to the contract price, they are still owing the plaintiff the sum of one thousand dollars in addition to the \$19 and some odd cents for the amount of the sidewalk expense.

The defendants, it is true, allege that they have suffered damages in excess of the damages that the plaintiff claims, but it is very slightly in excess. Their complaint really stands in the nature of a defense against the claim of the plaintiff, and not as an independent cause of action upon which they are entitled to recover as against the plaintiff, it being conceded that they have paid the plaintiff all but the sum of \$1,019 of the amount that is to be paid for the work and labor.

It is a case then, according to the facts set up by the defendants, assuming the statements in that regard to be true—it is a case, not for the recovery of damages, not for a judgment for damages, unless it might be for an insignificant sum. It is a matter of defense, not a matter of recovery against the plaintiff. We doubt very much whether, in such a case as that, where a plaintiff brings an action in equity to enforce a mechanic's lien and the defendant comes forward and admits the making of a contract and alleges non-performance or breach of contract on the part of the plaintiff whereby he has not earned his contract price—we doubt very much whether, under such circumstances, if the case is taken from the equitable jurisdiction of the court where it is put by the petition of the plaintiff, it presents an action at law for trial by jury.

But aside from that, if it should be found that an action at law was presented by the answer and cross-petition, on trial in the determination of that to a jury, if that is the proper tribunal, and an appeal taken in the case would not open up the law matter that was submitted to be tried by a jury, it is conclusive that if the appeal takes up anything, it takes up only the equitable matters outside of the law claims which have been submitted and tried.



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In the case of *Sallady v. Webb*, 2 Ohio C. C., 558, which was fully relied upon by this court in the case of *Brack v. Gaa et al.*, 6 Ohio C. C., 580, is found quite an interesting discussion of a kindred subject of which I will read the following four paragraphs, being the syllabus:

"1 If the plaintiff sets out in his petition an equitable cause of action, and no issue of fact is taken on the averments thereof; but the defendant sets up new matter in his answer constituting a legal cause of action, which, if established, will extinguish the case made in the petition, such legal cause of action is triable by jury.

"2. The plaintiff may appeal from a decree in such case dismissing his petition, although the decree is based upon a finding that the sum due on the legal cause of action is equal to or exceeds that claimed by him in his petition, and thus extinguished it.

"3. That such appeal does not open and bring for re-trial in the circuit court the issues joined and tried in the court of common pleas upon the new matter set out in the defendant's answer.

"4. That if, in the circuit court, no issue is taken on the averments of the petition, the court will render such decree, as the justice of the case requires in view of the case confessed in the petition, and of the legal rights of the parties as settled in the court below."

The following is the statement of facts in the case of *Sallady v. Webb*, *supra*:

"This action was brought to foreclose a mortgage given by defendant Webb in 1881, to his co-defendant, Wheeler, and assigned by Wheeler to the plaintiff. No issue was taken on the averments of the petition. Webb, the mortgagor, answered, setting up: 1. That his co-defendant, Wheeler, in 1874, sold him the mortgaged premises, and that the mortgage was executed by him to Wheeler to secure the balance of the purchase money unpaid at the date of the mortgage. That Wheeler had induced him to purchase the premises by misrepresenting the location of their boundaries, having no reasonable grounds to believe the statements to be true, and that he was greatly damaged thereby.

"2. That Wheeler, at and before the time the mortgage was assigned, was indebted to him for timber before that time sold and delivered to Wheeler. The reply denied the averments of the answer."

The opinion in this cause was delivered by Judge Bradbury who afterwards became one of the judges of the supreme court, and he says:



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"This action was brought by the assignee of the mortgage to foreclose it, the plaintiff making both mortgagor and mortgagee defendants. There was no prayer for a personal judgment.

"The petition set forth a cause of action, purely equitable, in which neither party had a right to a trial by jury, and therefore, by sec. 5226, Rev. Stat., either party could appeal to the circuit court.

"The fact that no issue was joined on the averments of the petition, cannot be held to defeat the right to appeal: there is no such express limitation of this right made by the statute providing for the appeal. And it is clear that in cases where no issue of fact is taken on the averments of the petition, the defeated party may appeal from a decree adjusting his rights upon the facts stated therein, as in cases where, upon issue joined, the court has found the facts against him. The very point of contention may well be over disputed rules of law applicable to admitted facts. The right to appeal is given in the broadest terms; the language of the statute cannot be construed to confine this right to cases in which the contention is, in whole or in part, over the facts. If this view is correct, it would seem to follow that the right to appeal the case made in the petition, cannot be defeated by the defendant setting up in his answer a legal cross-demand which he may do or not at his election, but which if he does set up, compels the plaintiff to take issue upon, or be defeated in his action. The motion to dismiss the appeal is therefore overruled.

"The plaintiff's appeal being sustained, the defendant Webb, confesses his petition to be true by taking no issue upon its averments, but moves the court for a decree finding that the plaintiff's claim therein set forth is extinguished by the finding of the court below on the legal cross-demands set up by him in his answer, the court below, as disclosed by the record, having found due Webb, thereon, from the plaintiff's assignors, a sum of money greater than the plaintiff claimed in his petition. The motion is founded upon the claim, that the appeal of the plaintiff did not open up, for re-trial in this court, the issues of fact joined in the court below on the defendant's cross-demand."

Then the court quotes from the statute upon the subject, and also quotes from the case of *Buckner v. Mear*, 26 Ohio St., 514, which shows wherein that case differed from the one before him, and then the learned judge says:

"We therefore hold, that the appeal of the plaintiff in.

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Gladieux v. The St. Louis Parish of Toledo.

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this case did not open for re-trial in this court the issues joined in the court below on the cross-demands set up by Webb, and we decline to hear evidence relating thereto. And it appearing by the record, that the sum found by the court below due to Webb on his cross-demands, is greater than the claim of the plaintiff, we hold that the plaintiff's claim is extinguished thereby."

It seems that the result from that case, granting that there was a legal cross-demand submitted to the court for trial in the action—a cross-demand against the mortgagee who had transferred the claim upon which the plaintiff had brought his action, to the plaintiff—granting that there was such a cross-demand and a trial and judgment by the court below upon the issue made as to the cross-demand, and the facts presented as to the cross-demand, the court was of the opinion, and so adjudged, that while the plaintiff had brought his suit, the mortgagee might appeal, but that the appeal did not open up the judgment that had been rendered upon the cross-demand of the original mortgagee against the mortgagor, both of them having been parties defendant to the action. That the judgment of the court upon trial as to the validity of that mortgage was conclusive, not only upon the mortgagor and mortgagee, who were parties defendant in the action, but also as upon the plaintiff himself; that appeal did not open up that decree or judgment; that nevertheless an appeal might be taken by the plaintiff in the action. The result was, under the ruling of the court that, the court having found that the mortgage was entirely extinguished by reason of the facts shown in the case, there was no validity as against the mortgagor, and that, having found the amount of damages as against the mortgagee in favor of the mortgagor in the cross-petition that exceeded the amount of the mortgage, the result of the petition of the plaintiff in the action even for foreclosure was dismissed.

Now here, if this was a case proper to be tried by a jury, and was a case in which the parties were entitled to a trial by jury upon the issue made as to the cross-petition in the case—if that is so, the ruling of the court in this case would seem to conclude as to the facts covered by the verdict returned by them—it would not interfere with the right to appeal as against the claim of the plaintiff upon a mechanic's lien and an equitable proceeding which would conclude the matter as to the facts found and determined by the jury in a matter for consideration in this court, and if it was a

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 Brandon v. The L. S. & M. S. Ry. Co.
 

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matter not triable to a jury, that is, these matters set up in the answer by way of abatement or reduction here, then the whole matter would be opened for trial here, and upon the whole our view is that the case was one in which an appeal could be taken and the motion to dismiss the appeal is therefore overruled. As to how far the parties may go into the matters that were passed upon and determined by the jury we do not undertake to say.

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(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1896.)

Before Scribner, Haynes and King, JJ.

BRANDON v. THE L. S. & M. S. RY. CO.

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*Statement volunteered by a witness on matter not in issue under allegations of petition, to be ruled out—*

- (1). Where a witness in the course of his cross-examination, volunteers a statement not responsive to the question, to the effect that to do a thing that the witness is asked whether he had ever seen done, in a general way, that he had seen it done, but that it had been against the rules to do that, and he is inquired of as to what rules he had reference and what was the rule. On cross-examination, counsel, asking to ascertain what the matter was that the witness was talking about, at the very moment it was disclosed that it related to a printed rule of the company, that the witness had seen posted along the line of the track, counsel promptly moved to exclude that statement for the reason that the party had not had any notice of any such rule and that no charge or complaint as to any such rule was made in the petition, a motion to rule out such testimony should be sustained.

*Recalling witness for further cross examination at any stage of the trial, proper—*

- (2). It is a common practice for counsel, and permitted by the courts, to recall a witness at almost any stage of the case, for the purpose of cross-examination, particularly where it is desired to contradict a statement of a witness who has testified, by the evidence of other parties.

*Witness to state facts, not opinions—*

- (3). It is not for the witness to state to the jury whether it would be convenient or inconvenient or how convenient or inconvenient it would be for a man engaged in certain work to do it in a certain way, but the witness could state to the jury the exact facts and situation to enable the jurors to determine whether or not it was convenient or inconvenient to do it in a certain way.
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Error to the Court of Common Pleas of Lucas County.

SCRIBNER, J.

This is a petition in error to reverse the judgment of the

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Brandon v. The L. S. & M. S. Ry. Co.

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court of common pleas in a case wherein the plaintiff in error was the plaintiff and the defendant in error was defendant, which verdict and judgment in the court of common pleas were in favor of the railway company.

This action was commenced in the court of common pleas on March 8, 1890. It was brought to recover damages for an injury alleged to have been sustained by the plaintiff while in the service of the railway company, in consequence of alleged negligence on the part of the company connected with the movement of cars in one of the elevators used in connection with said railway. The record shows in regard to this case, that at the April term, 1890, it was tried to a jury in the court of common pleas, and that at that trial the jury found a verdict in favor of the plaintiff. Motion for a new trial was filed by the defendant railway company, which was granted by the court and the verdict was set aside and a new trial ordered. Afterwards, at the September term, 1891, of the court of common pleas, the case was again tried to a jury, and upon that second trial a verdict was again returned in favor of the plaintiff. A motion for a new trial, made on behalf of the railway company, was, in January, 1892, considered by the court, and the motion was overruled and judgment rendered upon that verdict in favor of the plaintiff and against the railway company. As a part of the history of this case of which we have knowledge, the railway company prosecuted a petition in error in this court to reverse that judgment, and upon the hearing of that petition in error this court reversed the judgment of the court of common pleas and granted a motion for a new trial upon the ground that the verdict was not sustained by sufficient evidence. The record in this case presented here does not show that a proceeding in error was ever prosecuted, or that the judgment rendered in the court of common pleas in favor of the plaintiff at the time it was made was ever reversed, or that a new trial was ever granted. The mandate sent back to the common pleas indicated what had been done in this court in this case, but it appears never to have been entered upon the journal of the court of common pleas by the clerk, as it should have been done, and as was required by the statute to be done; but the journal entry here proceeds to show that in April, 1895, another trial was had of the case, and upon that trial the verdict of the jury was in favor of the defendant. A motion for a new trial by the plaintiff below was overruled, and a judgment was rendered in favor of the defendant. The plaintiff then filed

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his petition in error in this court, and the case is now before us upon the petition in error so presented by the plaintiff below.

The plaintiff in error, in the petition in error, assigns for error:

"1. That the said court erred in ruling out the evidence of the witness Patrick Daugheny, offered at the said trial by the said plaintiff, as shown on pages 46 and 47 of the bill of exceptions.

"2. That the said court erred in excluding from the consideration of the jury the evidence of the witness John Gerkins, as shown on page 108 in the bill of exceptions filed herein.

"3. That the said court erred in allowing Mr. Potter, the attorney for the defendant, to cross-examine Thomas Brandon, the plaintiff, and introduce the testimony of the plaintiff as he did by such cross-examination after the plaintiff had rested his case, as shown on pages 186 and 187 of the bill of exceptions filed herein.

"4. That the said court erred in sending the special finding to the jury, as requested by Mr. Potter, the attorney for the defendant, and erred in instructing the jury to answer such findings by yes or no, and erred in instructing the foreman of the jury to sign such special findings of facts, as shown on page 162 of the bill of exceptions filed herein.

"5. That the said judgment was given for the said defendant, when it should have been given for the plaintiff in error."

Upon the disposition of this case upon the petition in error filed by the railway company, the case has been considered in all its material facts, and was discussed by the court; and I refer to the opinion delivered upon that occasion as stating the principal facts bearing upon the acts of the parties as developed by the testimony, and the view then taken by this court in considering these facts, and I propose to avail myself now of the statement then made as furnishing a brief method of stating the facts in the case as we view them:

"This case comes into this court upon a petition in error from the court of common pleas. On April 11, 1889, Thomas Brandon, plaintiff below, was in the employ of the Lake Shore and Michigan Southern Railway Co., as a laborer in elevator "A," located in this city. His service and duties consisted in assisting in moving, loading and unloading cars with grain. The elevator in which he was employed was furnished with bins into which and from which grain

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was loaded and unloaded. It was also furnished with scales upon which cars were run by means of railway tracks, being loaded from or unloaded into these bins. At the time at which the accident occurred which is complained of in this proceeding, the company used for the purpose of moving its cars upon the scales to be loaded, and for the purpose of removing the loaded cars from the scales and to place thereon other cars, a rope and certain tackle which was operated by steam power. There was a drum or cylinder, whichever it may be called, located in the elevator near these scales. This drum or capstan was set in motion and was caused to revolve by steam power, and a large and heavy rope was wound around this capstan or drum, and on the end of it was a large hook which was attached to the car, either where a single car or more than one was to be moved. This rope was coiled several times around the drum, and at a certain time a signal would be given to the engineer to start the drum or capstan and put it in motion; and that being done, the drum being put in motion, a man would take hold of the rope and walk along in the proper direction, to manage it, and the drum so revolving, with the rope coiling about it, and a hook at one end attached to the car, would put the car in motion and move it towards the scales. Upon reaching these scales the forward car, the one which was intended to be placed upon the scales for the purpose of being loaded, would be caused, by the force or motive power imparted to it, to contact with the loaded car upon the scales, and by force of the contact and collision would force the loaded car off the scales upon the track before it, and the forward loaded car of the moving train or string of cars would be thus forced upon the scales, and there stop, a man being there to keep it from running off the scales by the use of a block or some such apparatus. This method of moving empty cars from the scales, and forcing the loaded cars upon the scales, had been in use for some considerable period of time. Prior to that, horse-power was used—prior to the adoption of steam power. Horses had been attached or hitched to the rope, and by a proper movement upon the part of the horses the empty cars would be forced against the loaded car driven to, and the empty cars would then be placed in position on the scales for the purpose of loading.

“The plaintiff below, Mr. Brandon, had been in this service perhaps ten to twelve years, and during a considerable portion of that time was engaged in the work about the elevator, and employed in the work of placing cars on the elevator scales for loading and unloading, for several years.

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"On April 11, 1889, the date I have already mentioned, a loaded car was standing on the scales. It was desired to remove that car from the scales and place another car thereon for the purpose of being loaded. Four empty cars were there; the men were at their proper places; the hook of this rope was attached to the second car from the front or in advance, and the scales, I should say, were located at the north end or north part of the elevator building. The cars were moving from the southern portion of the building northward along the track, and the loaded car was standing upon the scales at what was known as bin "B." The four cars, coupled together, were brought forward for the purpose of being sent, in the manner I have mentioned, against the loaded car. The hook in the rope was attached to the second car; the rope was properly adjusted around the drum; the proper signal was given; steam was applied, and the cars were set in motion and moved towards the scales, and were moving about as fast as a man could walk, but not a fast walk.

"As the advanced car approached the scales, Mr. Brandon—who with his fellow laborers was at that time properly attending to his duties—stepped in between the first car and the second car, to uncouple them. The slack of the cars was necessarily taken up by reason of the fact that the hook and rope were attached to the second car and they were being propelled northward towards the loaded car by means of this attachment and the application of steam power to the drum. One of the other men moved forward to go in and make the coupling; but Mr. Brandon was nearer and succeeded in getting into position first. It seems that the pin stuck, or did not readily come out from the drawbars. The advanced car came into collision with the loaded car upon the scales, and by force of that collision, of course, rebounded and was forced backward.

"In some way, Mr. Brandon's hand and arm were caught between the deadwoods, and were injured. It is to recover for that injury that he brings this action. In the court of common pleas he recovered a verdict upon which judgment was rendered, and this action was brought here by the company to reverse that judgment, mainly upon the ground that the verdict was not sustained by sufficient evidence."

The facts are still further elaborated in the conclusion of the opinion, which is:

"We have carefully looked through this record, with an

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anxious desire to do exact justice in the case, but we are unable to see our way clear in the discharge of our duty, to permit this judgment to stand, and the order will be that the judgment is reversed and the verdict set aside, as not supported by sufficient evidence, and the cause remanded for a new trial."

The record in this case is made up largely—to a considerable extent, at least—of the testimony adduced upon the former hearing, but there is some additional testimony carried into the record. We are unable to discover in the record anything to lead us to conclude that the judgment upon the present hearing should be in any respect different from that rendered upon the former hearing of the petition in error.

There are, however, some additional matters assigned—or, rather, presented—as bearing upon the case, set out in the petition in error, which I have read, and to which I will call attention.

It is suggested in the brief filed by counsel for the plaintiff in error, in the first place, that he ought to be permitted to intervene in this particular: "We contend that the first ground of error is well taken." That ground is "that the court erred in ruling out the evidence of the witness Patrick Daugheney, etc." And it is said here (in the brief) that "the witness, Daugheney, the record shows, was experienced in his business, and he was simply asked to give his opinion upon a given statement of facts on a point within his experience, and which is always proper. This error was prejudicial to plaintiff's rights."

I will here refer to the evidence briefly. The record shows this action on the part of the court. Mr. Daugheney was a witness upon the stand, introduced by the plaintiff, and he was asked these questions:

"Q. What was it you were told to do?"

(In this examination the witness is testifying to matter occurring at the time of the accident.) He answers: "As soon as it would hit this car that was loaded, to take the hook off, take off the rope—he gave the signal." (That is, he was asked to describe the method of transacting this business, and he made that reply.)

"Q. What was the fact as to whether you took the rope off, after, or not, as it hit the loaded car? A. I could take it off after it hit another car, but not with the other men on it—the minute it slacked I could take it off quick.

"Q. You spoke about a backwards and forward motion



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that these cars had, how long did that last? A. Well, it didn't last much.

"Q. What effect, if any, did this rope, operating there in connection with these pulleys, have upon the convenience of getting up and down alongside of the track there between the cars and the side of the elevator?"

'Mr. Potter: I object to that; I think that he might describe the space and the conditions, and how it operated, but it is not for him to give his opinion about it..

"Mr. Hamilton: I want his experience; I don't want his opinion.

"Mr. Potter: I object to it.

"Mr. Hamilton: Our contention is, that this was a dangerous place for that sort of business.

"The Court: The witness has described to the jury the space that there was there between the car and the platform, and I believe he called attention to the fact that the rope was on the ground, or near the ground; that they had to step over it, etc. It seems to me that it is for the jury to determine from the evidence as to the convenience or inconvenience of it."

The objection was sustained, and counsel below excepted.

Now it appears to us that the court was right in this ruling. It was not for the witness to state to the jury whether it would be convenient or inconvenient or how convenient or inconvenient it would be for a man engaged in this work to pass over the ground upon which these cars were being moved, or this rope was being used. The witness could, as he did, state to the jury the exact situation here; by stating the facts and situation, he could enable the jurors to determine whether or not it was convenient or inconvenient to pass. We think, therefore, that the court committed no error. Besides, I might suggest that the record discloses no offer on the part of counsel for the plaintiff to prove anything; he simply asks the question as to whether it was convenient or inconvenient, and the court holds that that is a question for the jury, and the witness had been permitted to state the facts surrounding, and the counsel excepts and leaves it there.

The next objection relates to the testimony of John Gerkins, and the counsel in his memorandum says: "We contend that the second ground of error is well taken for the reason that the evidence was simply in proof of facts that tend to prove negligence, even to the extent of violating the written rules of the company as posted and published." The

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assignment of error is: "That the said court erred in excluding from the consideration of the jury the evidence of the witness John Gerkins, as shown on page 108 in the bill of exceptions filed herein." Mr. Gerkins was a witness called by the plaintiff, and in the course of his cross-examination, on page 105 of the record, this appears:

"Q. You have no present recollection of seeing them butt a loaded car off by running empty cars down against it? A. If they did, it was done by mistake; it wasn't allowed.

"Q. I am not asking you that; I am asking you this: Have you any recollection during the fourteen years of your service there, of seeing it done that way? A. I think I saw such things when it was done, but it wasn't allowed; where it was done in case that they couldn't help it, something like that.

"Q. You say it wasn't allowed? A. No, it was against the rule.

"Q. Against the rules? A. To bump the car off the scale—entirely.

"Q. Who established that rule? A. It was a Lake Shore rule from headquarters.

"Q. Did you ever see such a rule as that? A. They never showed me the rules, but W. L. Stowe brought the rules there; yes, I saw the rules there; that no car should be bumped off the scales; W. L. Stowe brought the rules there.

"Q. When did you see that rule? A. That was a good while ago, because the scales used to have to be in repair.

Mr. Potter: He has spoken of a rule here. There is no charge made here or complaint; this is the first time I have heard anything of that kind, and it was a remark made by the witness, and was not in response to an interrogatory put by Mr. Hamilton. It seems now that this rule was a printed rule. I think that the whole subject is incompetent and irrelevant,, and I ask to have it removed from the jury.

"Mr. Hamilton: I object to that. It has all been brought out by the gentlemen.

"Mr. Potter: It is purely a matter volunteered by the witness. There is not a complaint that any rules of the company have been violated in that regard."

And the statement of Mr. Potter is true; the petition makes no allegation on that score.

"Mr. Hamilton: The objection I make is that this matter has been brought out by himself. I am not talking about whether it is relevant or irrelevant—I didn't ask him about the rule, but my friend pushed the inquiry as to the practice

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of butting those cars off, which he said never existed, and then he draws out this rule."

The controversy is pursued here for a time, and finally the court says this:

"The question arose in this way: In answer to a question the witness volunteered the statement that that was against the rule—of course, it didn't appear at that time what rule was in the mind of the witness, or what regulation he referred to, or anything about it. I take it that the counsel for the defense had a right to wait until he had a chance to examine the witness and refer to this matter. Now, on cross-examination, the witness testified that what he meant was that it was a rule of the Lake Shore Company, the defendant in this case, and that that rule was in writing. It seems to me that defendant had a right to wait until it was developed what the witness meant by this statement, before he asked that it be excluded. I don't know what the effect would be in this case one way or the other under the issue. The witness volunteered the statement; it was not in response to the question. And in explanation of this statement, on cross-examination, that the witness attempted to give of the statement made on direct examination, he has spoken of the written rules of the Lake Shore Company in reference to the handling of these cars. They have not had any notice of anything of that kind, and I think the motion should be sustained."

We think the court was right in this. The witness in the course of his cross-examination, made a statement to the effect that to do a thing that the witness is asked whether he had ever seen done, in a general way, said that he had seen the loaded cars, standing on the scales butted off, but that it had been against the rules to do that, and he is inquired of as to what rules he had reference and what was the rule. On cross-examination, counsel, asking to ascertain what the matter was that the witness was talking about, at the very moment it is disclosed that it relates to a printed rule of the company, that the witness had seen posted along the line of the track—counsel promptly moves to exclude that statement, for the reason that I have read, and the court sustains it; and we certainly think the court was right in the ruling that it made in that respect.

The third objection is, as to the court permitting counsel for the defendant, after the plaintiff had closed his case, to recall the plaintiff for the purpose of cross-examination. Immediately after the plaintiff had rested, Mr. Potter, counsel for the company, said: "I want to read the cross-exam-

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ination of Mr. Brandon, on the former trial of this case as a part of his cross-examination on this trial.

"Mr. Hamilton: I object to that.

"Mr. Potter: Then, if you object, I will recall Mr. Brandon for further examination and put him on the stand."

The plaintiff was recalled, and a further examination was had, and he made his statement, and we can see no substantial ground for objecting to this being done. Certainly it is a common practice for counsel, and permitted by the courts, to recall a witness at almost any stage of the case, for the purpose of cross-examination, particularly where it is desired to contradict a statement of witness who has testified, by the evidence of other parties. Now here the witness called was the plaintiff in the action. It is a common practice, and we think sanctioned by the rules of law.

Now then, there was a further objection: That the court permitted a special finding in the case to be submitted and answered by the jury. These interrogatories were submitted to the jury upon the application of the defendant below.

The first was: "Did the plaintiff know of the fact, at the time he stepped in to uncouple the cars, that there was a loaded car upon the scale track to be moved off of the scale by other cars being pushed or moved against it? And the answer returned by the jury was "Yes."

"2. Was the plaintiff familiar with the method and manner in which cars were moved in said elevator and off the scale? A. Yes.

"3. Did the plaintiff attempting to draw the pin, know, or could he have known by the exercise of ordinary care on his part in the performance of his service, of the danger of having his hands or arms caught between the deadwoods of the moving cars when the same came together? A. Yes.

"4. Was the plaintiff himself negligent, and if so, did such negligence or want of proper care on his part cause or contribute proximately or immediately to produce the injury of which he complained? A. Yes."

Well, the statute, as it seems to us, expressly provides that this may be done. In point of fact, the requirement is imperative, were the interrogatories submitted are relevant and pertinent to the issues to be tried, and we think these questions bear directly on the question of contributory negligence on the part of the plaintiff below.

This covers all the grounds assigned for error in the petition in error, and we fail to find that the record discloses any error in these proceedings, and the judgment therefore will be affirmed. *Hamilton & Ford*, for Plaintiff in Error.

*E. D. Potter, Jr.*, for Defendant in Error.

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Norton et al. v. Parker.

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(Sixth Circuit—Lucas Co., Circuit Court.)

Before Bentley, Haynes and Scribner, JJ.

JOEL H. NORTON et al. v. MARGARET PARKER.

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*Action for tort—Interest on damages—*

- (1). Where, in an action for damages for a tort, the jury in its verdict specifies how much the damage amounted to at the time, and how much the interest thereon would amount to, giving the sum total as its verdict, such verdict would not be invalid on the ground that no interest can be allowed on damages for a tort. Under the authority of *Railroad v. Cobb*, 35 Ohio St., 94, the jury in awarding damages for such an injury may include compensation in the nature of interest.

*Reversal of judgment below as to one joint party only—*

- (2). The circuit court may, on error in a case where there are several plaintiffs in error joined, reverse the judgment below as to one of them and affirm it as to the other.

*Bill of exceptions filed during subsequent term of court—Entry failing to state as of previous term—Presumption—*

- (3). Where a party is allowed thirty days to file bill of exceptions and that the journal of that term of court shall be left open for thirty days after adjournment of the term for entry of its allowance, and the bill is filed within the thirty days allowed, but the entry on the journal only states the date of the filing of the bill without stating that it was filed as of the previous term, the presumption will be that the bill was filed as of such previous term.

*Sale of furniture and boarding house by false representations—Measure of damages—*

- (4). Where the sale of furniture in a boarding house at a certain price was induced by representations as to the profitableness of the boarding house, and the certainty of a renewal of the lease, which were found to be false, in an action for damages the measure of damages would be the difference of what that property, as it was—on the basis as it was represented, and that rental, as it was represented—would have been worth to plaintiff if such representations had been true, and how much was it worth at the time of the sale if these material facts were untrue.

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Error to the Court of Common Pleas of Lucas county.

BENTLEY, J.

Joel H. Norton and T. M. Meinhart brought suit on petition in error against Margaret Parker to reverse a judgment for two thousand dollars that Margaret Parker obtained against them in the court of common pleas in an action prosecuted by her therein and in which an attachment was issued. Her petition in the court of common pleas charges "That on or about December 7, 1887, the said defendants, T. H. Meinhart, whose full first name is unknown to the plaintiff, and Joel H. Norton, conspiring together to cheat and defraud the plaintiff, and in order to induce the plaintiff to purchase the whole of the furniture of two houses situated on Michigan avenue, in the city of Chicago, known as

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Norton et al. v. Parker.

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numbers 1828 and 1830, and which had theretofore been and was intended to be used for a boarding house, and pay them, the said defendants, therefor a large sum of money, to-wit, five thousand dollars, falsely and fraudulently and with intent to deceive the plaintiff represented to the plaintiff that the business of said house which had been theretofore carried on by said Meinhart, was a successful and profitable business, and that during the two years next preceding that time said Meinhart had carried on the same as such boarding house, and that the said business had paid him a net profit of from two hundred to five hundred dollars per month, and that said Meinhart had made a contract with the owner of said property for an extension of the lease of said premises on the same terms on which it had been theretofore leased by said Meinhart and for any length of time the plaintiff might desire. That the plaintiff, relying upon such representations and with no notice of their falsity, but fully believing the same to be in all respects true, purchased all said furniture and paid said defendant a large part of said purchase price, to-wit, the sum of two thousand dollars." Then the petition proceeds to set forth that said representations so made by the defendants were false and known to be false at that time by the defendants below; that the said business carried on by Meinhart at that place had, on the contrary, been a losing business and not profitable, as the defendants below well knew, and that, as a matter of fact, there was no contract to renew said lease and that the lease could not be renewed; that the defendants below knew that, and that by means of these false representations they induced the plaintiff to purchase this boarding house property, which without a renewal of the lease, would have been of very little value, as is stated in the petition, and charges that she has sustained damages by reason of the premises in the sum of twenty-five hundred dollars, she having paid about two thousand dollars of the consideration money already.

An attachment was issued in the case and notice of garnishment served on the Ketcham National Bank. That branch of the matter has already been before this court.

The defendants did not question the petition in any way by demurrer—did not call in question its sufficiency—but each of them filed an answer containing general denials, and the case proceeded to trial to a jury, and the jury rendered a verdict for upwards of two thousand dollars, against both defendants.

There was a motion for a new trial, which was overruled,

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and it is claimed that a bill of exceptions was duly allowed and made a part of the record, embodying all of the evidence and exhibiting the full proceedings of the court in the case.

This is a petition in error filed here to reverse the judgment, and it assigns the following errors:

"1. That said verdict is not sustained by sufficient evidence.

"2. That said verdict is contrary to law.

"3. For errors of law occurring at the trial and excepted to by the plaintiffs in error.

"4. That the court erred in overruling the motion of plaintiffs in error for a new trial and entering judgment on said verdict."

The defendant in error claims that this bill of exceptions is not properly a part of the record, and should not be considered so far as it claims to set forth all of the testimony and exhibits and any error based upon the overruling of the motion for a new trial for the reason that the verdict was not sustained by sufficient evidence. The entry at the trial term is as follows—the case being tried at the January term, 1889—"To all which the defendant by their counsel then and there excepted and on their motion said defendants are allowed thirty days from the adjournment of this court within which to have their bill of exceptions allowed and signed, and it is ordered that when so allowed and signed within said time, said bill shall be filed and thereupon be and become a part of the record in this case. And the journal of this term shall be kept open for thirty days after its adjournment for an entry of such allowance to be made thereon."

The April term of the court began before the expiration of the thirty days after the close of the January term—perhaps the January term closed upon the morning of the same day at which the April term began—on April 18, 1889.

The next entry upon the journal as originally certified, is this: "On May 4, 1889, an entry in said cause was made which appears on the journal of said court in the words and figures as follows, viz.:" (Giving the title and number of the case.) "On this 4th day of May, 1889, came the defendants and presented to the court their certain bill of exceptions herein, which being found by the court to be true is allowed, signed and sealed, and is hereby made part of the record of this cause.' "

An amended certificate as to that journal entry has been filed in this case since this case came into this court, and is as follows: "On the 4th day of May, 1889, being within



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thirty days of the closing of the January term, 1889, there was filed in this cause an order, an entry of which appears on the journal of said court, being the journal of the January term, 1889, in the words and figures as follows to-wit:” (Giving the title and number of the cause and being the same as I have already read as first certified). It is claimed that this entry of May 4 not appearing in and of itself to have been made as of the January term, the court will presume, under the circumstances of the case, that it was entered of the term when it was actually made, that is, of the April term, and that it cannot be considered as an entry appearing upon the January term of that court. We need not enter into a discussion of this proposition, because it has already been considered in the hearing of a case recently, and the court held in that case, as it does in this, that this entry must be presumed to have been of the January term—the trial term—and that we must consider the bill of exceptions as a part in the record in this case.

There was some testimony delivered orally before the court on the trial of the case, but the large bulk of the evidence, however, had been taken in Chicago by way of depositions upon the part of plaintiff and defendants below. There are many exceptions to the testimony—objections to questions, in these depositions taken in Chicago, but the record in this case simply shows that the plaintiff introduced such and such depositions, which are attached, and that the defendants introduced such and such depositions, and it does not appear that the court of common pleas was called upon to consider those objections, only, as appears by the record, I think, in one instance, which appears on page 49 of the bill, when the deposition of Margaret A. Meinhart was presented, where this bill of exceptions shows this, as the action of the court of common pleas: “During the reading of the last mentioned deposition, the following question, on cross-examination, was objected to, by the defendants, as irrelevant and incompetent, viz.: ‘Q. Did not you state to Mrs. Kellogg, one of the boarders in that house, that Mr. Blain and Mr. Meinhart, your husband, in your presence, said words to the effect that they would take Mrs. Parker in the house, get her money, and then kick her out?’ Which said objection was by the court overruled; to which ruling the defendants by their counsel then and there excepted.”

And following that, is this statement by the court: “That is not admitted for the purpose of enabling the plaintiffs to afterwards contradict deponent’s statement on this subject made on cross-examination.”



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We have read the testimony in the case, of course including that which this objection calls in question; and we are of opinion that, in view of the answer of the witness to this question, the defendants below were not prejudiced by the action of the court in this regard.

In its charge to the jury, the court gave a number of propositions as requested by the defendants below, and if it refused any, they are not set forth in the bill of exceptions and we will consider no claim of error regarding that. There are one or two that are modified by the court of common pleas, and an objection and exception was taken to that modification, by defendants. Without reading them, however, we will say that we are unable to see that the slight modifications that the court made to those requests were prejudicial, or that they made the charge of the court in that regard erroneous.

It was strongly objected that the court erred in its charge regarding the rule of damages of the case, the court's charge in that regard being as follows:

"The injury is to be represented in damages; and the measure of damages would be: what would that property, as it was—on the basis as it was represented, and that rental, as it was represented—if it was falsely represented—what would it have been worth to her if such representations had been true, and how much was it worth at the time of the sale, if these material facts were untrue. Now, the difference—if there is any—between what it would have been worth if the representations were all true, and what it was worth, those representations not being true, will be the amount of damages Mrs. Parker has suffered by reason of these things not being true. Now, what is that amount? That is for you to determine, if there is any such damages."

That is a part of the charge which was excepted to as not exhibiting the true rule of damages in the case.

The direct testimony did not indicate but that the value of the furniture in and of itself, if it were considered merely as to its general market value—no matter where it was—was, perhaps, less than what was paid for it, or agreed to be paid for it—five thousand dollars; but it is claimed that the plaintiff below was induced to purchase it, which she otherwise would not have done, by these false representations regarding the value of the business about which it was used and about which it was intended that the plaintiff below should use it, and that although the furniture considered in and of itself, regarding its market value, might have been

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worth the five thousand dollars, yet if the plaintiff was induced to put her money into it and thereby embark in a losing business by reason of these false representations, the measure of her damages would be—not what the market value of the furniture would differ from the price which she agreed to pay for it, but the difference in its value to be used in that business, and what it would have been worth if the representations by which she was induced to purchase it had been true. It is perhaps a question of some nicety, exactly what the true rule of damages would be, in a case of that kind, but we are not satisfied and we do not feel at all clear but that the court of common pleas in its charge indicated the proper rule of damages. It would seem that under the circumstances if she was induced to put her money into a losing business by means of false representations, it could not be said that she lost nothing because the personal property which she bought was worth what she paid for it.

On the other hand, if it were insisted that the rule of her damages was the difference in the profits which were represented to be in the business, that would leave an uncertainty regarding the matter because it did not appear how long she might have carried on that business and made the profit that the defendant, Meinhart, had been making, or how long a time it was contemplated between them that the business should be thus carried on. The time was indefinite—she was simply to embark in the business of carrying on that house, which was a losing business, as it is claimed.

Now it occurs to us that the rule of damages is as the court of common pleas laid it down—the difference in the value of what she bought in the situation it was, and what it would have been in that situation for the uses and purposes for which she bought it, if the representations had been true.

Objection is made that the verdict on its face is improper, on account of its including interest—this being an action in tort. The verdict is as follows: "The jury empaneled in the above entitled action having been sworn well and truly to try the issue joined between the parties and a true verdict to render, for verdict find and say that we find for the plaintiff, and assess her damages at the sum of \$2,075.00

"and interest 121.39

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"Total, \$2,196.39

The interest "\$121.39" (in figures) is placed below the \$2,075, and then those two sums are figured up and the word

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"total" placed before the \$2,196.39. It would seem that the jury found the amount of the damages at the same time it added \$121.39 for interest.

In *Lawrence Railroad Co. v. Cobb*, 35 Ohio St., 94, the fourth proposition of the syllabus is as follows:

"4. In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included."

The judge in delivering the opinion says, upon that proposition: "Nor was there error in the charge of the court in respect to the amount of damages. The rule of damages in such case is compensation for the injury, or, in other words, that the injured party should be made whole. And while it is true that such a claim is not one, which under the statute, bears interest, nevertheless, if reparation for the injury is delayed for a long time by the wrongdoer, the injured party cannot be made whole unless the damages awarded include compensation, in the nature of interest, for withholding the reparation which ought to have been promptly made."

This question in *Lawrence Railroad Co. v. Cobb*, *supra*, was raised upon the charge of the court to the jury, and it did not appear in the verdict itself as plainly as in this case, that interest was in fact included; but the substantial statement of the jury in this verdict is that the total amount of the damages is \$2,196.39, and it appears that in arriving at that they figured as interest \$121.39; but we think under this authority that this was not improper; that they might lawfully do that, and therefore there was no error in the action of the court in rendering judgment on such verdict.

We come now to the other question presented: whether this evidence is sufficient to sustain the verdict against both Joel H. Norton and T. H. Meinhart.

It will not be profitable, perhaps, for one to go over, in detail, the points in the testimony—I have not time for that; but it is sufficient to say that we have read the testimony and considered it carefully, with regard to Mr. Norton and with regard to Mr. Meinhart, separately—because it is claimed that whatever may be the force of the testimony against Meinhart, it would not sustain the verdict as against Mr. Norton. In considering the testimony, we think the evidence tended to show at least that the charges in the petition against Meinhart were true. Of course, there was evidence given both ways; but he admits squarely that he made substantially the representations which were charged

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to have been made, but he says, on the other hand, that they were true. There is direct testimony to the effect that they were true for the most part; but there is also testimony strongly tending to show that in a substantial degree they were not true, and, the jury having passed upon them, we do not think we are warranted in interfering with the verdict as to him.

The testimony regarding Mr. Norton might be considered in two aspects: The only aspect as to which we should consider it is, as to whether it substantiates the charge of the petition—that Norton aided and abetted Meinhart in the original fraud charged against him and which resulted in the injury to Mrs. Parker.

There is other evidence given in regard to dealings with the mortgage which Mrs. Parker made over as a part of the purchase price, bearing upon the question as to whether or not Mr. Meinhart, or Mr. Norton, owns that mortgage, or whether Mr. Meinhart has any interest in it; but, as we look upon the case, as it is presented in this record for our consideration, we are simply to determine whether Mr. Norton was the aider and abettor and joined in the original fraud upon Mrs. Parker whereby he rendered himself liable to a personal judgment for the amount of her damages. We find the evidence barren of proof that would fairly sustain the verdict as against Mr. Norton, as to his joining in the original fraud and deception by which Mrs. Parker was led into this arrangement, and we think the judgment against Norton is not sustained by the evidence.

As regards the other questions—whether the evidence tended to show that Mr. Meinhart really had an interest in this mortgage at the time it was sold, and that the money attached was really and properly attachable as the money of Mr. Meinhart in this action—we think the record does not present that question to us or call upon us for any decision or intimation of any opinion in regard to it.

Under the authority of certain holdings of the supreme court—one of which is in *Rengler et ux. v. Lilly*, 26 Ohio St., 48, we are authorized in an action of this character, to reverse the judgment as to one of the defendants and affirm it as to the other.

The judgment is therefore affirmed as to Mr. Meinhart; but, as to Mr. Norton, the judgment is reversed, and as to him, the verdict will be set aside and the cause will be remanded to the court of common pleas for new trial and for further proceedings according to law.

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The Gendron Iron Wheel Co. v. Santschi.

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(Sixth Circuit—Lucas Co., O., Circuit Court.)

Before Bentley, Haynes and Scribner, JJ.

THE GENDRON IRON WHEEL CO. v. SANTSCI.

*Testimony—Rule as to weighing same—*

Where witnesses on one side of a controversy give testimony which is reasonable and consistent with itself, and other witnesses on the other side, contradict the testimony and testify to the contrary matter, it is not proper to disturb the finding of the jury either way, though their finding is contrary to the testimony of the greater number of witnesses. But the probative force of the testimony of any witness is not derived solely from his direct deposition as to any given matter, but is rather the final result of all his averments bearing on the matter, when considered and analyzed with reference to known circumstances and facts. This may leave the matter supported not by the full force of the witness' observations, but only by such strength as is left in them after they have been weakened by the other statements of the witness himself, or by the known and settled order of things.

BENTLEY, J.

Mr. Santschi recovered a judgment against the Gendron Iron Wheel Company, in the court of common pleas, for \$4,500, for an injury suffered by him while employed by the company, by the bursting of an emery wheel.

Various errors are assigned in the petition in error, but none were argued or relied on in this court except those founded upon the claim that the verdict is against the weight of the evidence.

The facts, as claimed by the plaintiff below, are these: On May 4, 1890, the plaintiff, a young man of about twenty-six years of age, had been working for the plaintiff in error for some days about their factory, here in Toledo, where machinery was run and bicycles and other articles were manufactured. His work was not confined to any certain kind of employment, but, as he expressed it, he was "working at most everything."

On May 14, he was, by one of the foremen of the company, put to work at an emery wheel running at a high rate of speed, grinding small protuberances or burrs left in casting one of the small iron parts of bicycles, called "binders." He had been thus working nearly all day, having no notice or knowledge of any defect in the emery wheel or of any danger from its swift revolution, and along late in the afternoon the wheel burst, and, its motion being towards him, one of the flying pieces of the wheel hit him on the head and severely injured him. He claims that, in fact, the emery

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wheel was defective; that a small piece had fallen out of it the day before while another workman was grinding on it, and that that workman had promptly called the attention of the said foreman to it and had refused to work longer upon it, and that, thereupon, the wheel was taken from its place on the left end of the shaft and placed on the right end of the same shaft, and another emery wheel which had up to that time been on the right hand end of the shaft, was placed on the left end; in short, that said two wheels were changed about, but said defective wheel was allowed to run in its new place, and that the defect was such as would render it dangerous and liable to burst, to the knowledge of the company, and that it did burst by reason of said defect and the high rate of speed at which it was run.

Some question was made as to whether the person who set the plaintiff to work at the wheel (a Mr. Krete) was authorized so to do, and whether his relations to the company were such as that notice to him of the defect in the wheel was notice to the company; but we think his authority and relation were sufficiently shown, and there is no controversy but that plaintiff was injured, and by the flying fragments of an emery wheel at which he was working. The decisive thing is, was the wheel which burst defective as claimed, and was Mr. Krete's attention so called to it? The plaintiff in error earnestly contends that, though the jury evidently so found, the great weight and force of the evidence indicates otherwise. And it is perhaps fair and proper that we state the testimony, facts and deductions that make for the support of the claims on each side on this issue.

The plaintiff testified that he went to work at the wheel on the right hand end of the shaft of the machine in question, about eleven o'clock in the morning of the 14th, and worked until noon, then quit for dinner and began again at ten minutes to one o'clock, and worked some hours till the wheel burst. He says that he did not use the face or periphery of the wheel, but ground on the side of it, and did not notice or know of any defect in it, and that he had some experience with emery wheels off and on for four or five years, and was careful, and he says that he didn't let any binder get under the wheel and between that and the iron table of the machine under the wheel. He says that the wheel that he worked on was thicker and smaller in diameter than the one exhibited to the jury, which was an inch thick and four inches in diameter.

The evidence of the defendant below tended to show, and the defendant claims the truth is, that the accident occurred

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from the plaintiff's allowing many of said binders to lie on the table of the machine, and that the slight jar of the machinery would move them about, and nothing prevented one of them from coming in contact with the wheel, and that immediately after the accident it was noticed that a part of the wheel that burst still clung to the shaft and showed it to be an inch wheel, and not one and one-half inches thick, and right under the place of the centre of the wheel one of these binders was then sticking up, being lodged in the round draft hole through the table, and on the upper corner as it lay a place was ground off as if by the wheel. This piece of iron, or binder, was exhibited to the court, being attached to the bill of exceptions, and the machine itself, with a four-inch emery wheel, one inch thick, was also exhibited, and it was demonstrated that if such a piece should get into that position under the wheel, while in motion, it would inevitably tear the wheel in pieces or cause it to burst. Several witnesses testified to seeing those binders all over the table while plaintiff was at work, and to the fact that the wheel that burst was a fourteen-inch wheel, one inch thick. The man who originally put it in new, a few days before, says he put this inch wheel on the left side and worked on it there, ground on it the day before Santschi was hurt, and that Hill that day changed it from the left to the right side, and that he and not Santschi was grinding on it up to the time that Hill changed it. And there was much testimony tending to show that Santschi was not grinding on the machine on the 18th, but was at work in the rubber room, and that Barchant was grinding on the 18th where Santschi claimed that he—Santschi—was. Mr. Hill, who was the man who changed the wheels, according to the testimony on both sides, says he did it so the large wheel could be on the right, as it was handier in grinding mud-guards, and that the fourteen-inch wheel was thus left on the right hand side, and that he had the wheel in his hands and there was no defect that he saw. There was no evidence tending to show that the fourteen-inch wheel was defective, but that persons ground tools on its face several times that day. Mr. Kerte denies that his attention was called to any defect in the wheel, but says that if it had been it would have been his duty to take it off and not suffer it to be run.

The testimony was conflicting as to whether such defect in the wheel as testified to by Surtman and Hutchinson could have been seen while the wheel was running, but

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several expert witnesses testified that such a piece being out of a wheel run at such speed as this ran—over 1,500 revolutions per minute—it would throw the wheel out of balance and cause the whole machine to so shake and tremble that no one could avoid noticing it, and it could not be used. There was no testimony contradicting this (except the said testimony of the plaintiff that he did not notice any such thing, and that of Surtman and Hutchinson, that the piece was out). There was, at least, no claim or proof but that the wheel ran apparently smooth and all right till it burst, with no such jar or shaking of the machine.

To prove the existence of said defect in the wheel, the plaintiff called as a witness one Surtman, a workman then employed about the defendant's shop, who testified that on May 18—the day before the accident—he, Surtman, was engaged in grinding on an emery wheel on the left end of the shaft in question all day until about two, or half-past two o'clock, when he heard a scund as if something had hit a piece of sheet iron; that he then stopped the wheel—not on that account—but to get a drink, and when he came back from getting a drink, he noticed that a piece was broken from the edge or corner of the emery wheel at which he had been grinding, about an inch and a half down on the side of the stone and extending to the face or periphery of the stone about one and one-half inches. That this was about 2:30 P. M. That about three o'clock he called another workman—one Hutchinson—over and showed him where the chunk was out of the wheel, and soon after called Mr. Krete's attention to it and refused to work longer at the wheel, thinking it dangerous. That Krete said nothing, but walked off, and soon after the wheels were changed about, by a man named Hill—a sort of sub-foreman in another room—and that he, Surtman, saw the wheel with the same chunk broken out, on the right-hand end of the shaft, the next day, where the plaintiff was working when hurt.

The plaintiff called the said Hutchinson as a witness, and he testified that on the afternoon before Santschi was hurt, as he was passing where Surtman was at work, he called his attention to a place on the edge of the emery wheel where a chunk had broken out. He describes it about the same as Surtman did, and says he told Surtman to be careful and not press too hard on the wheel, and to sit on one side because it would burst. He did not notice the wheel afterwards, but says that it ran after that on that day.

These two witnesses—Surtman and Hutchinson—furnish all the testimony in the case as to said defect in the wheel,



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or notice to the company of it. Counsel for defendant in error claim that this is sufficient proof of the negligence of the company, and that however directly or thoroughly they may be contradicted by other witnesses, the jury had their testimony, and had the right to believe them.

We notice that while one of the defendant's witnesses was on the stand, he was asked, on cross-examination, if he did not say in the presence of a sister of the plaintiff and the plaintiff, when calling on the plaintiff, a few days after he was hurt, that the wheel which burst and hurt the plaintiff had a chunk cut of it the day before. He denied having said so, and in rebuttal, Mr. Santschi's sister contradicted him—Santschi not being called for the purpose—and she testified that he did so say on the said occasion. This testimony is not to the main issue, and can in strictness only be considered as affecting the testimony of the witness Strutt; leaving the plaintiff's case to stand upon the testimony of Surtman and Hutchinson as to the defect in the wheel, and of Surtman alone as to notice to the company of the defect.

The plaintiff says that he did not notice any defect in the wheel, and was grinding on the side of the wheel, and his counsel argue that the defect could not be seen when the wheel was revolving, and that though it was at rest at times during the day—at the noon hour at least, and once when the plaintiff stopped it to oil the machine—it might have stopped so that the broken part was undermost and so would not probably be noticed.

We will now notice some of the considerations urged as showing the improbability of the story of the defect in the wheel.

1. This action was brought on July 24, 1890, Mr. Santschi verifying the petition July 16, 1890. He had gone back to work at the Gendron two or three weeks after he was hurt, and worked off and on there five or six weeks, he says. His original petition does not mention a defective wheel, but charges negligence only in running the wheel at a dangerous rate of speed whereby it burst. The allegations about the defective wheel were put in long after the original answer and reply were filed, and on leave of the court, on February 9, 1891, by interlineation. It is argued that if the plaintiff knew this fact upon which his case depended, really, he would have mentioned it to his attorneys, and they would have been sure to put it in the petition; and also that if this Mr. Strutt had, as claimed, said, in the presence of the plaintiff and his sister, that the wheel had a defect in it the

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day before, and it was then regarded as so important that it was remembered, the plaintiff must have known and remembered it when he filed his petition; and that, at all events, when the plaintiff returned to duty at the shops after so serious an accident, the causes of the accident and the circumstances would have been discussed between him and his fellow workmen, and the fact of the defect must have come to his attention, and the fact that he did not charge it in his petition, is strong evidence that no such fact was thought of or known about the shop, and that if such defect had been known to two workmen about the shop, it would have been a matter of general comment among all, and as this was evidently unknown to the plaintiff after being about the shop so soon after his injury and for so long a time, it is urged that there is strong ground for doubting this story of Surtman and Hutchinson.

It is also testified by a foreman of the company that he discharged Hutchinson for coming drunk to the shop, on the day Santschi was hurt, and that Surtman was afterwards discharged for throwing some iron tubing down an elevator.

The story of Surtman is peculiar. He says that the wheel that finally burst was twelve inches in diameter and two to two and a half inches thick. The man who put it in says it was one and one-half inches thick; that it was comparatively a new wheel, having been put on the left end of the shaft of this machine a few days before May 14; that he had ground on it there, off and on, for four or five days, and it was apparently all right till as he was sitting before it, on May 18, this piece came out. It did not hit him, though it would naturally take his direction. It had been ground on when running at a high rate of speed, for several days. There was no suggestion that it had been hit so as to crack this little piece out—nothing to indicate that that little piece flew out of the corner for any other reason than that the wheel was imperfectly compacted and shed pieces by reason of its great velocity—this being so, it would seem strange that it would disintegrate in that way, by detaching an inch and a half piece from the corner, the remainder of the wheel staying intact during its constant use at a like velocity, all the next day till it went to pieces near night. Mr. Surtman says he realized the danger of being at work on it and refused, on that account, to continue the work. He calls the attention of the foreman to it—the foreman Krete—who testifies that if his attention had been called to it, he would not have allowed it to run, and his duty would be to at once take it off; and this foreman walks off without a

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word, and does nothing to change the wheel. As it happens, the wheel is changed by another man, for another purpose, either that day or the next—probably that day—and on the day that Santschi was injured, Mr. Surtman—who says he refused to work on it on account of its defect and the danger—sits within two feet of it for hours grinding on another wheel of the same machine on the same shaft, where danger would be almost as imminent as when he was grinding on the wheel itself, since the piece that flew out when he was grinding did not hit him, but must have gone to the left of him, and he says that he never called Santschi's attention to the defect, nor provided for his own safety, and did not know but that any moment Santschi would attempt to grind on the face of the wheel as Surtman had done, instead of on the side. There is no explanation of this conduct of Surtman offered, except that he says that he did not know but that the foreman had told Santschi of the defect. But even if Santschi should be careful to grind only on the side of the wheel, this would not obviate the danger to Santschi, or to Surtman, should other pieces fly out of the wheel or should it go to pieces from its defective character and the velocity of its revolutions.

This conduct of Surtman, as he himself relates it, is so utterly a variance with his statement of what he observed before, as to impel the mind to the conviction that there must be some mistake somewhere. But his position at the wheel on the day of the injury is not only shown by his own testimony, but by other evidence, and there is no question or controversy about that part of his story.

Again, there was no evidence tending to prove that there was any defect in any wheel other than the one twelve inches in diameter and from one and a half to two and a half inches thick. The plaintiff says that the wheel he was working on—the wheel that burst—was, as he judges, not more than a half or three-quarters of an inch from the iron table beneath it; that he put his mind to the danger of letting binders get under the wheel, as it might hit him—"break on him." If the wheel was only a twelve-inch wheel, it is manifest that the binder would not touch it, since with a fourteen-inch wheel, the space is just one-eighth of an inch smaller than the greatest diameter of a binder. So that a twelve-inch wheel would clear a binder by three-fourths of an inch. So that the plaintiff was mistaken in his testimony as to the wheel being smaller than the fourteen-inch wheel, or in his statement of the distance between it and the table. He says that during the day he stopped his work at

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the wheel in order to let persons grind tools upon it, and that they did so; at least two of the defendant's witnesses testify that they did thus grind tools on the face of this stone, and there was no trouble—a thing that would be next to or altogether impossible if such a defect existed in it.

We think no one can read the record of this case and not feel a decided and irresistible conviction that the truth of the matter was with the claims of the defendant below as to the material facts. The testimony of the defense makes a most satisfactory showing as to how this accident could and probably did happen. With the testimony of Surtman and Hutchinson as to the defect in the wheel, does the case present such mere conflict of testimony as to render it improper for a reviewing court to interfere with the verdict of the jury, based, perhaps, upon a belief of the testimony of these men? Where witnesses on one side of a controversy give testimony which is reasonable and consistent with itself, and other witnesses on the other side, contradict the testimony and testify to the contrary matter, we do not deem it proper to disturb the finding of the jury either way, though their finding is contrary to the testimony of the greater number of witnesses; but the probative force of the testimony of any witness is not derived solely from his direct deposition as to any given matter, but is rather the final result of all his averments bearing on the matter, when considered and analyzed with reference to known circumstances and facts. This may leave the matter supported not by the full force of the witness' observations, but only by such strength as is left in them after they have been weakened by the other statements of the witness himself, or by the known and settled order of things. We regard the testimony on behalf of the plaintiff in respect to the alleged defect in the wheel as largely self-destroyed, and when we add the power of circumstances sworn to by certain of the defendant's witnesses, and some of them not contradicted, we feel an abiding conviction that the truth of the case as shown by the record, would not justify the verdict rendered, and that to let it stand would be to allow manifest error to triumph over truth.

We have read with great attention the opinion of the court of common pleas in overruling the motion for a new trial, and we think we see in it a recognition of the unsatisfactory character of the finding of the jury and of their estimate of the evidence, and we regret that the judge of that court did not deem it his duty to set the verdict aside and to grant a new trial. We think his overruling of the motion for a

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new trial was erroneous for that the verdict is against the clear and manifest weight of the evidence.

The plaintiff met with a severe injury. There is no doubt of that. And perhaps there would be a natural desire that those more able than he should help to bear it; but there are misfortunes that come to us all, which, though hard to endure, must be borne as a part of the ills of life which we must suffer and for which we have no lawful redress against our fellows. Verdicts of juries and judgments of courts must stand upon settled principles which justify them, or not at all.

The said judgment is reversed, the verdict set aside, and the cause is remanded to the court of common pleas for a new trial, and judgment is rendered against the defendant in error for cost, and a special mandate is awarded to the court of common pleas for execution thereon

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(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1894.)

Before Bentley, Haynes and King, JJ.

ENGELMAN, ADM'R., v. THE L. S. & M. S. RY. CO.

*Boy on railroad track—Trespass—When not entitled to damages for injury—*

Where in an action by an administrator for wrongfully causing the death of his intestate, it appeared from plaintiff's evidence that the deceased, with other boys, for no purpose connected with the railroad company, or its operations, or business or interest, and without the consent of his parents, but against the warning of his mother, went upon the railroad tracks of the defendant; that his purpose was to amuse himself, probably, with these other boys, and to pick up coal and carry it away—for he appeared to have had a basket with him—and was apparently in the act of stooping to pick up coal when he was struck dead by the train which came up behind him, his attention being probably directed to this purpose of getting the coal, and he was thus prevented from seeing the train which was approaching him from behind, it is a case in which the deceased if he had survived would not have been entitled to damages from the R. R. Co., and is it proper for the court, on motion of the defendant R. R. Co., to instruct the jury to return a verdict for defendant.

(Affirmed by Supreme Court without report Oct. 22, 1895.)

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BENTLEY, J.

This was an action brought in the court of common pleas of this county, for the killing of a boy about twelve years of age, young Bartelt, he being killed by being struck while on the tracks of defendant company in the neighborhood of Swan Creek bridge, in this city. The train of the defend-

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ant company, it seems, came along while the boy was on the tracks, not at a public crossing, but on the right of way, and perhaps at a place where persons had been in the habit of crossing or traveling for some time. The boy was stooping, apparently picking up something—coal, perhaps—close by the outer rail of the track, and the beam at the base of the pilot, projecting beyond the rest of the pilot, and perhaps beyond the rest of the engine, struck him and killed him. He was not seen by the engineer nor the fireman—those in charge of the train—and they did not know until they had proceeded down to the depot that any such thing had occurred.

The administrator of the boy charges that the company was negligent in the manner as follows:

"Plaintiff further says the said death of the said John Bartelt was wrongfully and negligently caused by defendant as follows, to-wit: The employees of defendant, while engaged in the defendant's business in operating cars of defendant upon and along defendant's railway tracks at the locality aforesaid, were accustomed to and did wrongfully and negligently throw off coal upon and along the line of way of said tracks of the said defendant company, and invited the children in the neighborhood to come and gather the same up to take and carry it away.

"Plaintiff further says that the railway tracks of defendant in and at said locality were not fenced in or otherwise arranged so as to exclude the public therefrom, but defendant allowed the same to be so open and exposed to public use, and allowed and permitted the public to come upon and use and make a thoroughfare thereof in the locality aforesaid, and so it was that the said John Bartelt, being invited thereto by the defendant, did, on the said 8th day of February, 1898, go upon the said tracks of defendant at the place aforesaid, and while there at the invitation of defendant engaged in picking up the coal upon the defendant's railway track, without any warning by the defendant or its employees to keep away from and off from the said tracks and line of way of defendant, the said John Bartelt was wrongfully and negligently struck by the locomotive and cars of defendant and killed as aforesaid.

"Plaintiff further says that at the time said John Bartelt was so killed by the locomotive attached to the railway cars of defendant as aforesaid, the said locomotive and train was being operated upon and along said railway tracks of defendant at an exceedingly high rate of speed, contrary to law and ordinance, and so it was that although the said



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John Bartlet was upon the tracks at the locality named, where the engineer and fireman of said locomotive could see him at a great distance therefrom, yet the said employes and agents of defendant wrongfully and negligently failed to observe and see the said John Bartelt, and wrongfully and negligently ran said locomotive and train of cars at an excessive rate of speed upon and against the said John Bartelt, without warning, in such wise as to strike and instantly kill him as aforesaid."

The petition then charges that the boy was in the exercise of ordinary and reasonable care for one of his years.

The plaintiff, upon the trial, called certain witnesses for the purpose of establishing the facts charged in his petition, and rested his case. Thereupon counsel for the railway moved that the jury be instructed to return a verdict for the defendant upon the testimony as it then stood.

The court, in finally passing upon that motion, stated, as appears from the bill of exceptions, as follows:

"The court understand the cause submitted upon the evidence to present the following facts: That upon the 8th day of February, 1893, the deceased, with other boys, for no purpose connected with the rail road company, or its operations, or business or interest, and without the consent of his parents, but against the warning of his mother, went upon the railway tracks of the defendant; that his purpose was to amuse himself, probably, with these other boys, and to pick up coal and carry it away—for he appeared to have had a basket with him—and was apparently in the act of stopping to pick up coal when he was struck dead by the train, which came up behind him; his attention was probably directed to this purpose, of getting the coal, and he was thus prevented from seeing the train which was approaching him from behind

"To claim that under these circumstances—no odds what coal had fallen off the cars of defendant along there—along the line of its road—and no odds, if you please, that brakeman may have thrown it off purposely, they did so in furtherance of an unlawful and a dishonest purpose on their part. We think that these boys cannot be held to have been on the track of defendant, with right to be there; but, on the contrary, they were there at best at their own risk. We have no doubt but what the company would have been justified in not only ordering them off, but in keeping them off of its tracks. The mere fact that it did not do so, did not give these boys a right to be there to obstruct the management and operation of its trains and the business of the company.

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Now, however much it is to be regretted, the consequences to this boy, from so sad an accident which destroyed his life in an instant—however much this is to be regretted, it seems to me that nothing can be clearer than that no financial liability attaches to the defendant because of this injury to the deceased. And now, inasmuch as we must hold that, had the boy not been killed, but had survived the injury which he received, he could not have maintained his action against the defendant company, therefore his administrator cannot maintain an action for the purpose of recovering damages by reason of his injury and death.

“We will therefore sustain the motion which is here made and direct the jury to return a verdict for the defendant.”

And the jury, thus instructed, did return a verdict for defendant, and a judgment following that was rendered by the court.

A motion for a new trial had been made and was overruled.

We have read the testimony in this case and we think that it proves the facts recited in the court's disposition of that motion.

We have had occasion heretofore to consider the rights of boys upon railway tracks at places not at a public crossing, although at a place where people quite frequently passed over in crossing over and along the road, and perhaps to the knowledge of the servants to the company. It was incumbent upon the plaintiff in this case, of course, to make out by affirmative proof the allegations in his petition to warrant recovery, and it was incumbent upon the plaintiff to show, not only that the running of the train was wrongful, but that the death of the plaintiff's intestate was caused by the improper handling and running of the train, and not in any degree by such negligence as the facts would require to be attributed to a young boy.

As I have recited, it does not appear that, in fact, the servants of the company handling this train saw the boy upon the track. He was not upon the engineer's side; and the fireman, perhaps engaged in other matters and attending to his duties, did not see him, did not know that the boy was near the track—in fact, as I have said, did not know that the engine had struck him until some time afterward. At this place in question the railroad grounds were fenced upon one side, but on the northerly side, the side from which the boy approached the tracks, they were not fenced. There was quite a high grade at that point, and there was no crossing or public street for some little distance from it. There were



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places up and down where persons going along there to their work, either railroad men or others, had worked paths to the approaches, and it was shown that persons more or less frequently passed along there, and that boys had been upon the tracks, and on some occasions had taken baskets and picked up coal that was scattered there, either fallen from the engine or thrown from the car. It does not appear that any persons had had their attention called to these actions of the brakemen in throwing off coal, or that anybody knew anything about it except the brakemen who did it. It does not appear affirmatively whose coal it was, except that it was such coal as was carried upon cars of the company passing along there. Some of the witnesses make some expression as if such acts would be to the loss of the shippers of the coal; that it was coal belonging to some persons who were shipping along the line of the railroad, and not to the railroad company.

After reviewing the testimony, we are of the opinion that the facts warrant the statement which I have read as coming from the court, and that it warranted the final disposition of the case as made by the court; in other words, that the plaintiff did not show such circumstances as indicated that the boy was free from negligence contributing to his death, or that the persons in charge of the engine either did see, or were fairly in duty bound to see, the boy in time to protect him from being struck by the train. The judgment, therefore, will be affirmed.

Plaintiff excepts.

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(Fifth Circuit—Licking Co., O., Circuit Court—March Term, 1898.)

Before Adams, Douglass and Smyser, JJ.

HENRY D. SPRAGUE v. RICHARD LAW et al.

*Dower right of wife in land mortgaged by her husband before marriage—*

A wife is entitled to dower in land of her husband mortgaged by him before marriage, and only those claiming through, or having a right to claim through the mortgage instrument, can defeat the wife's right of dower. A mere judgment creditor cannot set up the foreclosure proceedings to defeat her right of dower; but as against his judgment, she has dower in the whole premises.

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SMYSER, J. (orally.)

The case of Henry D. Sprague v. Richard Law, et al., is submitted to the court upon a finding of facts made by the

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court below. The contention is between the executor of Van Voorhis and Nora Law. The original action was begun by Sprague in 1896, and it was founded upon a promissory note for a thousand dollars, executed by Richard Law in 1892, secured by a mortgage upon certain real estate described in the petition. Deeds was made a party defendant. He answered setting up a note of a thousand dollars and a mortgage securing the same on the same premises described in the petition, the note and mortgage bearing date in 1886. Richard Law and Deeds were the only parties defendant originally. Van Voorhis, as executor of Van Voorhis, deceased, intervened upon his own motion, and filed an answer and cross-petition alleging that in 1896, by the consideration of the court of common pleas of this county, he recovered a judgment against Richard Law for \$1,808. Nora Law intervened, and upon her own motion was made a part defendant. She alleged that she was the wife of Richard Law; that she was married in 1898, and, as wife, had a contingent right of dower in the premises subject to the mortgage, and asked that her rights in the premises, as wife, be protected. A decree in foreclosure was taken, and a sale of the premises had; and, after the payment of costs, taxes and the mortgage claims of Sprague and Deeds, there remained for distribution \$148.68. Van Voorhis claimed this fund by virtue of his judgment. Mrs. Law claimed this fund by reason of her contingent right of dower in the premises. That states sufficiently the facts that are submitted. They are found substantially as I have stated them by the court below. I may add that it was conceded or found by the court that when these mortgages were executed, Law was unmarried. He married Nora Law in 1898. After the execution of these mortgages, but before the recovery of the Van Voorhis judgment, counsel for Van Voorhis contended that in no event is this woman, as the wife of Richard Law, entitled to anything in these premises; that she had no interest; that the sale of the premises under foreclosure worked a conversion of the realty into personalty, and there can be no such thing as contingent dower in personalty. They contend also that the mortgages having been executed before this defendant became the wife of Law, she could, as against these mortgages, have no right of dower; and, because she could have no right of dower as against those mortgages, she could have no right of dower as against this judgment; that there was no estate of the husband. It is urged here that there can be no such thing as dower; that the man is alive, etc.

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Counsel cite us 27 Ohio St., 464, and Fox v. Pratt, 27 Ohio St., 512, two cases, which they contend are decisive of their claim to this fund. Counsel for Mrs. Law cite Mandel v. Clave, 46 Ohio St., 407, as equally decisive of their contention.

In Ohio, we think, even though a mortgage be outstanding the estate is the estate of the husband. In the case of Kerr v. Lydecker, 51 Ohio St. 240, 248, I desire to call attention to a paragraph: "The mortgage being, in equity, regarded as a mere security for the debt, the legal title to the mortgage premises remains in the mortgagor, as against all the world, except the mortgagee, and also as against him until condition broken." On page 250: "After condition broken, the title is vested in the mortgagee, as between him and the mortgagor, and as the right of the mortgagee to recover the possession of the land by ejectment, always existed at common law, and has not been taken away by statute, it still exists in this state." In sec. 3851, Rev. Stat., we think there is a clear statutory recognition of the right of a wife to contingent dower. This is the section under Insolvent Debtors' act. "Payment of liens, etc.; questions of title, dower etc.; the probate court shall order the payment of all incumbrances and liens upon any of the property sold, or rights and credits collected, out of the proceeds thereof, according to priority; provided that the assignee may, in all cases where the real estate to be sold, or which may have been contracted to be sold by the assignor prior to the assignment, is incumbered with liens, or where any questions in regard to the title, or the dower estate of the wife or widow of the assignor require a decree to settle the same, commence a civil action in the common pleas court or probate court of the proper county, making all persons in interest, including the wife or widow of the assignor, parties to such proceedings; and upon hearing, the court shall order a sale of the premises, or the completion of the contracts of sale so made by the assignor; the payment of incumbrances and the contingent dower interest of the wife or widow." The court is to hear and determine in such cases the right of the wife, and adjust her contingent right of dower.

The case of Culver v. Harper, supra, is relied upon by counsel. The syllabus is: "The widow of a purchase-money mortgage, mortgage given before marriage, and property sold by executors to pay the mortgage debt, is not dowable of the whole proceeds, but only of the surplus remaining after satisfying the mortgage." On page 512: "A widow

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is dowerable of the surplus remaining after the payment of a purchase-money mortgage."

Judge Follett: This is not that kind of a mortgage.

The Court (continuing): I understand not; at least, there is no finding that it is a purchase-money mortgage.

These cases furnish the rule, and the question is whether in this particular case Mrs. Law is brought within these two cases to which I have just called attention. The court say that it would be inequitable and unjust to take the property of a man and turn it over to the wife of the mortgagor; and for that reason they say that, as against a purchase-money mortgage, she shall not have dower.

I read from page 468, in the case of Culver v. Harper, supra: "This doctrine of instantaneous seizin is somewhat technical. It was invented for righteous ends, and is therefore useful. It would be the height of wrong that the wife should have dower as against the purchase-money mortgage."

On page 515 of Fox v. Pratt, supra, the court say: "It has already been held that in case of a purchase-money mortgage, the widow is entitled to dower, not in the whole property, but only in the surplus after paying the mortgage debt. \* \* \* This is the rule as regards the rights pertaining to the purchase-money mortgage, and those claiming under that instrument. Where other interests exist, other considerations may perhaps arise."

The case at bar is somewhat like the cases of Culver v. Harper and Fox v. Pratt, supra, because this woman did not sign these mortgages. She was not the wife of Law when the mortgages were executed; but, does it follow that she is precluded from dower in the whole proceeds by reason of the fact of her non-marriage at the time of the execution? There is a growing liberality in Ohio to protect the rights of a wife, and to extend rather than to curtail them. A very instructive case is found in Yeoman v. Lasley, 40 Ohio St., 196, but we will not take the time further than to cite it to the attention of counsel.

In Mandel v. McClave, 46 Ohio St., 407, first paragraph of the syllabus reads as follows: "The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively." Justice Bradbury says, on page 410: "If the contingent right of a wife to dower in her husband's

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real estate is recognized by the laws of the state as property, and if her release of it by joining with her husband in a mortgage to secure his debt, is not a technical bar, but, instead, only inures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying in favor of the wife, the equitable rule that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity, to prevent the application of this equitable rule; they have no claim that property, which as between husband and wife belongs to the wife, shall be taken without her consent, and applied to pay their debts against the husband."

The court substantiates the proposition that it is valuable property. Then it reasons upon the effect of her signing in this instance. She did sign the mortgage, but the court held that she signed the mortgage simply as security for the husband, and the interest that she had in his estate was her interest, and that his property should go, first, to the payment of his debts; and, there being sufficient to endow her out of the residue, she was entitled to be endowed out of the entire estate.

By Chas. H. Follett—: She had the legal title.

The court (continuing): She had the legal title, that is true. I cannot stop to read all this, but this is the principle running through it, that only those claiming through, or having a right to claim through the mortgage instrument, can defeat the wife's right of dower; and in this case we hold that Van Voorhis, being a mere judgment creditor, had no right as between the husband and the wife. Her right to dower was in the whole premises, and Van Voorhis, as a judgment creditor, cannot set up the foreclosure proceedings to defeat her right of dower; as against his judgment, she had dower in the whole premises; and without pursuing it further, we think the case of *Mandei v. McClave*, supra, is decisive of this question. As found by the court below, as between Van Voorhis and Mrs. Law, she was entitled to be endowed out of the whole proceeds; and, that being true, it follows as a matter of course that she would be entitled to the residue of this fund that is now on hand, and a decree will be entered accordingly.

*Jonathan Rees*, for Plaintiff.

*Follett & Follett*, for Defendant.



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1. An action against the individual members of a public board is a distinct action from one against the board as such, and can not by answer be changed to an action against the board itself. *State ex rel. v. Buckley*, 86

**BOND, OFFICIAL.**

1. Officer having given two successive bonds, bond last in force liable for breach unless it be affirmatively shown that breach became absolute during existence of first bond. *Woolard v. Favorite*, 72
2. Where in an action on an administrator's bond the sureties thereon deny the execution of the bond by them, if a certified copy of the record of the bond is produced and offered in evidence, under sec. 5, R. S., it would be prima facie evidence of the execution of the bond; but where the original is offered and an effort made to prove the signatures of the defendants thereto, evidence must be produced which will satisfy the jury by its weight that the defendants did actually sign the bond, and if such evidence is not produced, the verdict must be in their favor. *Newberger v. Finney, admr.*, 215
3. A charge by the court that the bond produced being conceded to be the original bond filed with the probate court, and testimony having been introduced tending to show that it has been in the possession and custody of the probate court from the time of its execution to the present time, that the introduction of such bond made a prima facie case of its execution and existence, is error. Ib.

**BURGLARY & LARCENY.**

1. Possession as evidence of guilt—See Criminal Law.

**CANAL LAND.**

1. While the act of the legislature of 1863 gave to the city of Toledo an easement in that part of the Miami canal known as the Manhattan Branch, for street, water and sewerage purposes, it was the act of 1871 which gave to the city the full title, not only in the bed of that part of the canal, but also in all the lands held by the state for canal purposes within the limits of the Manhattan branch of the canal, and the city had thereupon the power to give a full and complete title to part of such lands to a purchaser thereof. *Paige v. Cherry*, 579

**CHARGE OF COURT.**

1. When the charge is in all things applicable to the issue tendered by the pleadings, it must be presumed, in the absence of steps taken to save the case for review upon the evidence, that there was submitted to the jury at the trial evidence to support the issues in the pleadings, and that to the evidence as given, the charge is responsive. *T. & O. C. R. R. Co. v. Marsh*, 379

2. Where the charge of the court on a certain point is assigned as error, to bring the question before the reviewing court, the court should be requested to charge upon that point, and if considered erroneous, to formulate a charge such as the party excepting considers to be correct. *Meeker v. Browning*, 548

**CHURCH.**

1. Trustees of a religious society or association, organized under sec. 3241, R. S., without consent and authority from the members of such society or association, and without authority from court first obtained for that purpose, have no power to sell or give away the real property of the society or association. *So. Kenton U. Sunday Sch. Ass'n v. Espy*, 524

**CITY**—See Corporation, Municipal.

**COLORED PERSON—**

1. Refusal of equal accommodation as for white person—Suit for penalty—Sec. 4426-2, R. S. *DeVeaux v. Clemens*, 33

**COMMERCIAL AGENCY.**

1. Information in book of commercial agency—Where the book published by a commercial agency, in general use at the time among commercial men, and to which the party has access, contains the information that the words "& Co." in a name under which a party does business, are nominal only, it is a circumstance which should go the jury, to show notice, and it is error in the court to exclude it from the evidence. *Crosier v. McNeal*, 644

**COMMON CARRIER.**

1. Where a carter conveys goods designed for shipment, to the freight depot of a R. R. Co. and deposits them on the platform of such depot, where such goods are customarily delivered for shipment, and notifies the proper shipping agent of the presence of such goods on the platform, and that they are to be shipped to a certain station after one of the articles has been properly crated, and that a person will come and crate such article during the day, and the agent of the company expresses his assent to what is said and proposed. Held, this amounts to the delivery of such goods to the railroad company and its ac-

**COMMON CARRIER—Continued.**

ceptance of the custody thereof as warehouseman. *Fisher v. L. S. & M. S. R. R. Co.*, 491

2. Evidence of negligence—The plaintiff upon the trial having introduced evidence tending to establish the facts above recited, and also tending to show that later on the same day such goods were removed by some person and means and to some place unknown to her, and that upon demand said company failed to restore said goods to her, the court, on motion of the defendant, ruled that the plaintiff had failed to make out a case, and directed the jury to return a verdict for the defendant. Held, error. While it devolved upon the plaintiff to show that the defendant had been guilty of negligence in that it had failed to exercise due care in the premises whereby the goods had been lost, the facts above recited furnished some evidence of such negligence, and the case should have been submitted to the jury. *Ib.*

**CONSTITUTIONAL LAW.**

1. The Cincinnati alley law (90 O. L., 233), deprives owners of lots abutting on alleys of 20 feet or less in width in cities of the first grade of the first class, of rights which owners of lots abutting on alleys generally enjoy, and so far as alleys that were once improved and that are repaved without changing the grade thereof, located in such cities, are concerned, is in conflict with sec. 6, art. 13, of the constitution of Ohio. *Longworth v. Cincinnati*, 15

2. Election laws are laws of a general nature. *State ex rel. v. Buckley*, 86

3. While distinctive features may exist between cities and rural election districts which would justify distinctive laws, yet such distinctive features do not exist in cities as between themselves in any such marked degree as would make it a foundation for different legislation upon this subject as to them, and if these laws are of a general nature, any distinction made in them between cities is unconstitutional. *Ib.*

4. Control of city election boards outside of city limits unconstitutional—Act of 1898 (93 O. L., 361) unconstitutional. *Ib.*

5. Repealing clause in unconstitutional law—When invalid also—The repealing clause in the act of 1896, amending sec. 2926b, repeals the election laws theretofore existing. As sec. 2926b, as so amended, is unconstitutional and void, if the repealing clause therein would remain in force, there would be no laws to secure fair elections in Ohio. It is not reasonable to assume that such was the intention of the legislature, and the repealing clause of the act is therefore void as well as the rest of the act, and sec. 2926b as it stood before the passage of the amendatory act of 1896, remains therefore in force. *Ib.*

6. A general law is one which relates to or binds all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint. A law is special, where it is suspended in one locality where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. *Ib.*

7. Laws giving the probate court of one county special jurisdiction constitutional, but laws giving to the common pleas and circuit courts of one certain county special powers unconstitutional. *Gill v. Sealbridge*, 390

**CONSTITUTIONAL LAW—Continued.**

8. The act to authorize the trustees of the South Kenton Sunday School Association of Kenton, Hardin county, O., to convey by deed the real estate now held by them as such trustees to the Epworth M. E. Church of South Kenton," and passed March 17, 1898, (93 O. L. p. 462), is unconstitutional. So. Kenton Union Sunday Sch. Ass'n. v. Espy, 524

**CONTEST OF WILL—See Will.****CONTRACT.**

1. In the construction of a contract. (oil and gas lease), partly printed and partly written, where there is an ambiguity arising out of inconsistency of the printed with the written parts, the written parts will control. Fort Orange Oil Co. v. Wichman, 57

2. Insurance of several distinct items of chattel property in one policy—Entire contract, cannot be split up in several suits. N. B. & M. Ins. Co. v. Cohn, 185

3. Breach of contract for sale of cordwood—Measure of damages. Lloyd Lumber Co. v. Solon, 194

4. Contract with married woman—Liability—See Married Woman. Sanders v. Shepherd, 503

5. Contracts by commissioners to build new water-works in Cincinnati—Plans, drawings and specifications—What sufficient—Provision for alternative bidding and changes to be made in contract admissible—Delegation of power to engineer, what will not amount to. Ampt v. Cincinnati, 516

**CONTRACT, PUBLIC.**

1. Where a board of education advertises for bids for one of its contracts, retaining the right of rejecting any or all bids, a bidder whose bid was rejected, although the lowest, can not compel the board by mandamus to award the contract to him. State ex rel. v. B'd. Ed., 663

2. Burns Law—When applicable to a contract—A contract by a village which on its face binds it absolutely to pay a certain amount within a certain time to be ascertained thereafter, payment to be made out of the general fund, is within the Burns law, although it may have been expected that the payment would be made out of the proceeds of a street assessment, such limitation not being expressed in the contract. McGrew v. Elmwood, 676

3. The provision in a bond given by a contractor for work to be done for the U. S. Government, whereby he is bound to "make full payment to all persons supplying him labor or materials in the prosecution of the work," does not cover scrapers or any other tools or implements furnished such contractor for the performance of the work. Barday v. Salmon, 152

**CORPORATION, MUNICIPAL—See also Sinking Fund Commissioners.**

1. Where the property of plaintiff was injured by the city filling up street and raising catch basins of sewers already paid for by the property owners whereby the drainage of her lot was destroyed, and the water set back on her lot, making the same unwholesome and untenable, she is entitled to damages. Alliance v. Campbell, 595

**CORPORATION, MUNICIPAL—Continued.**

Injury to passer-by from defective sidewalk—See Sidewalk.

2. The city is responsible for the defective condition of a sidewalk constructed by the owner of abutting property— in this case the board of education—by order of the city. *Alliance v. Campbell*, 595

3. Under the law of Ohio, a party may acquire title to real estate as against the municipality by adverse possession. *Mott v. Toledo*, 472

4. Burns law—When applicable to a contract—A contract by a village which on its face binds it absolutely to pay a certain amount within a certain time to be ascertained thereafter, payment to be made out of the general fund, is within the Burns law, although it may have been expected that the payment would be made out of the proceeds of a street assessment, such limitation not being expressed in the contract. *McGrew v. Elmwood*, 676

**CORPORATION, PRIVATE.**

1. The net earnings of a corporation are the property of the corporation until such time as a dividend is declared, dividing the surplus among its stockholders. *Adams v. Shields*, 129

2. Scrip certificates—Issuing scrip certificates to the stockholders of a corporation, redeemable in the future in stock of the company, for surplus earnings, is not a division of the surplus in money, or a promise to pay money among the stockholders. In such case the corporation continues thereafter to be the owner of such surplus, and the stockholders gain nothing more than a promise to have stock in the future for the surplus. *Ib.*

3. Certificates taxable by corporation, not by stockholders—If the company be an Ohio corporation, and returns and pays taxes on all its capital in Ohio, then such scrip certificates are not to be listed for taxation in Ohio, and are not taxable. *Ib.*

4. A resolution by a corporation authorizing the purchase of a party of its own stock by B. as trustee for the company, to be paid for with notes of the company, is a purchase of a part of its own stock by the company. *Merchants' Natl'. B'k. v. Overman Carriage Co.*, 253

5. Such a purchase by a company from two of its officers "in consideration of their proposed retirement", does not come within the exception to the principle of law that a company cannot deal in its own stock; the purchase was invalid, and those who attempted to sell did not cease to be stockholders. *Ib.*

6. Fraudulent action of bank directors breaking bank--Right of one who lost his stock thereby to sue them—The cause of action against the directors and officers is an asset of the corporation, and the latter alone has the right to sue for it, and, in case of its refusal or neglect to sue, a stockholder for himself and the other stockholder may sue. *Zinn v. Baxter*, 283

7. Where the members of an insolvent partnership convert their business into a corporation, turning over to the corporation all the assets of the partnership in payment for their stock subscriptions, but the corporation also assuming all the liabilities of the partnership. Held, that nothing whatever should be

**CORPORATION, PRIVATE—Continued.**

counted as a payment of the stock subscriptions, and the subscribers to stock are liable to the creditors of the corporation for their subscriptions to stock. *Ford, Rec., v. Ammon-Stevens Co.*, 539

8. Corporation insolvent in fact, but going concern, has the right to pay creditors by way of preference there being no collusion. *Ib.*

9. A creditor of a corporation which is still carrying on its business, although insolvent in fact, of which such creditor is not aware, may take a cognovit note from such corporation, and take judgment thereon, and his levy of such judgment on the assets of the corporation will be upheld. *Ib.*

10. An insolvent corporation with no expectation of being able to continue its business, can not rightfully secure or pay debts owing to its directors. *Ib.*

11. An attachment levy by a creditor on the assets of a corporation carrying on its business although in fact insolvent, will give a valid lien on the assets levied upon. *Ib.*

12. The statutory liability of a stockholder may be enforced as to debts of the company contracted subsequent to the making of a written contract by the stockholder for the sale of his stock but prior to the actual transfer of the stock on the books of company. *Ib.*

**COUNTY COMMISSIONERS.**

1. While the commissioners are by law clothed with full power to construct, or cause to be constructed, all necessary public buildings and additions thereto, and to let contracts therefor; yet they must first fully perform the requirements of sec. 795, R. S., in making accurate plans, definite specifications and bills, description of materials, etc., etc., and estimates of costs and expense of such building or addition. *State ex rel. v. Co. Com'rs.*, 370

**CRIMINAL LAW.**

1. A party indicted for murder in the first degree and held without bail can not, as a matter of right, ask to be heard on an application to be admitted to bail when the case is set for trial at an early date, and a refusal of such application by the court is not a ground for reversal of the judgment in the case. *Martin v. State*, 406

2. The counsel appointed by the court to assist the prosecuting attorney in the trial of a case, should not be actuated merely by private and personal motives, but the discretion of the court in this matter is not limited by any requirements of qualification in the statute. *Ib.*

3. Dying declarations—In weighing dying declarations, the jury may take into consideration all the circumstances under which the declarations were made, including those which were proved to the court in laying the foundation for their admission. *Ib.*

4. The jury may, notwithstanding the fact that those questions have already been passed upon by the court, determine whether the declarant was in extremis, and fully convinced of the fact when making the declaration. *Ib.*

5. A declaration by the person injured, to be competent as a



**CRIMINAL LAW—Continued.**

dying declaration against the accused, must have been made while the declarant was in articulo mortis or in extremis; the person must in fact be about to die as well as that the declarant believes that he is. And while in the present case the declarant lingered even three months, this of itself would not render the evidence incompetent, but if the evidence shows that when the declaration was made death was not imminent, the evidence should not be received. *Ib.*

6. Evidence of improper relations as motive for homicide—Evidence by the prosecution tending to show improper relations between the accused and the wife of the deceased is admissible to show the motive for the shooting. But in such case the defense has the right to introduce evidence showing the character and reputation of the wife as a pure and virtuous woman, to disprove such improper relations, and the refusal by the court to admit such evidence is error. *Ib.*

7. Self defense—Where the defendant pleads self defense, the jury is to look at the case from the standpoint of the defendant himself, and determine under the circumstances surrounding him, of stress or excitement it may be, whether, without fault or carelessness on his part, he did honestly believe that he was in imminent danger of losing his life, or receiving other grievous personal injury, and to prevent this it was necessary to take the life of his assailant. *Ib.*

8. The charge of the court, that to make out a case of self defense the defendant must have had such ground as would cause a man of "ordinary courage", or of "ordinary firmness", or "an ordinarily courageous man" to so believe, is erroneous. *Ib.*

9. Burglary and larceny—The fact of possession by defendant of the stolen property soon after the burglary and larceny was committed, is not of itself sufficient to warrant a conviction of defendant, but to warrant such conviction there must be some competent evidence, implicating defendant in the crime, in addition to the fact of possession. *Blaney v. State,* 486

**CUSTOM.**

1. A custom claimed among contractors to help themselves to each other's material unreasonable and not binding, but competent to prove absence of criminal intent. *Kuhl Artificial Stone Co. v. Mack.* 663

**DAMAGES.**

1. Breach of contract for sale of cordwood—Measure of damages—The price of other property of the same kind in the market which plaintiff might have bought should be ascertained, and the difference of the market price and the contract price would be the measure of damages. This is the rule unless the property is of a peculiar kind, and can not be obtained in the open market, or there is no market price for such property, when profits naturally to be expected may be considered. *Loyd Lumber Co. v. Solon,* 194

2. Plaintiff being permanently injured by a fall caused by a defect in a sidewalk, the court charged the jury that "These injuries alone of health, things of that kind, can not be compensated in money fully, but that is the only compensation the law can give to a person if injured by the fault of another."



**DAMAGES—Continued.**

And again: "Money can not compensate for the loss of health; perhaps can not compensate for pain and things of that kind, but as far as is reasonable and proper the jury may go in compensating for those things as far as money will. "etc., as more fully stated in the opinion. Held, Not error. Toledo v. Clopeck, 585

3. A verdict against the city for \$1,000 under the facts of the above case not held excessive. Ib.

4. Property damaged by water set back by city's action—Recovery. Ib.

5. The measure of damages to which owner is entitled in such case, would be the difference in the value in the use of the property before and after the acts of the city, during the four years prior to the commencement of the action, as also damages for the injury to plaintiff's health during these four years. Ib.

6. It is the well established rule of law that a party should use reasonable care to protect herself, to lessen if possible, the damages which she was liable to suffer by the continuation of these causes of action, and it is a question to be submitted to the jury, whether there was any known or reasonable way under her power and control whereby plaintiff could have lessened that injury. Ib.

7. Occupation of plaintiff as element to measure damages—In an action for damages for an injury suffered by the fault of another, it is proper to show who the plaintiff is and what his business is, as an element to determine the measure of damages suffered. Alliance v. Campbell, 595

8. Where the sale of furniture in a boarding house at a certain price was induced by representations as to the profitability of the boarding house, and the certainty of a renewal of the lease, which were found to be false, in an action for damages the measure of damages would be the difference of what that property, as it was—on the basis as it was represented, and that re-rent, as it was represented—would have been worth to plaintiff if such representations had been true, and how much was it worth at the time of the sale if the material facts were untrue. Norton v. Parker, 715

9. When the force used to eject one from a R. R. train amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train, is not an element in the question of mere recovery. R. R. Co. v. Marsh, 379

10. In awarding damages for a tort the jury may include compensation in the nature of interest. Norton v. Parker, 715

**DEDICATION—See Street.****DISBARMENT.**

1. An admission to the practice of the law is for life unless the attorney is sooner removed, and when he leaves the practice and goes into another business, he may at any time return to the practice again, and therefore, although he may have attempted to withdraw himself entirely from the profession, yet the courts have a right to deal with him as a member of the bar, and to disbar him. In Re Dellenbaugh and Burke, 106

2. The court has jurisdiction to try an attorney at law although at the time of such proceedings he may hold the office

**DISBARMENT—Continued.**

of common pleas judge, and may not be authorized at that time to practice his profession. Ib.

3. Although the present statute places the authority to admit persons to the bar exclusively in the supreme court, it does not deprive the circuit and common pleas courts of the jurisdiction in disbarment proceedings conferred by sec. 563, R. S. Ib.

**DITCH.**

1. Ditch running into lower county—Compensation from upper to lower county—Power of probate judge to increase or diminish award made by committee. *Comr's. v. Com'rs.*, 363

2. Same—Increased flow of water by public as well as private drainage to be considered—The statute which authorizes the assessment for increased expense in making an outlet applies to any increase that may be made on either public or private account. If it is created in the interest of better drainage, whether it be public ditches or private drains, if the increase comes on account of the artificial drainage, it is that which the lower county is required to take care of, and it is that for which they may require the upper county to contribute the expense. Ib.

3. Sec. 4491, R. S., authorizes an action to enjoin an assessment to pay for a ditch improvement, on the single ground of gross injustice in the apportionment; and if the fact of gross injustice is established on the trial, the plaintiff is entitled to relief by injunction. *C. C. C. & St. L. R. R. Co. vs. Com'rs. Logan Co.*, 436

4. Evidence tending to show that plaintiff wrongfully erected obstructions and destroyed the natural drainage and thereby created the necessity for better drainage and increased the cost and expense of securing it, is competent as bearing on the question of gross injustice in the apportionment of such cost. Ib.

5. When substantial benefit is made to appear, it becomes a proposition, not of gross injustice, but of equitable apportionment between persons mutually benefited; and in such case the party must pursue such remedy as is provided for by law, and is not entitled to injunction. Ib.

**DOWER.**

1. A wife is entitled to dower in land of her husband mortgaged by him before marriage, and only those claiming through, or having a right to claim through the mortgage instrument, can defeat the wife's right of dower; and a mere judgment creditor cannot set up the foreclosure proceedings to defeat her right of dower; but as against his judgment, she has dower in the whole premises. *Sprague v. Law et al.*, 735

**DYING DECLARATIONS—See Criminal Law.****ELECTION LAWS.**

1. Election laws are laws of general nature. *State ex rel. v. Buckley*, 86

2. Election laws applying to cities may be different from those applicable to rural districts, but distinctions in such laws between the cities themselves are unconstitutional. Sec. 2926b, as amended in 1898, unconstitutional, and sec. 2926b, as it stood before such amendment remains in force. Ib.

**ELECTION LAWS—Continued.**

3. Law giving board of elections of certain cities control over the elections in the county outside of city limits. unconstitutional. *Ib.*

4. The requirement of sec. 9, of the election laws of Ohio, (93 O. L., 189), that in cities where the votes are registered, the nomination of city officers shall be filed with the city board of elections not less than 15 days previous to the day of election, is not mandatory. *State ex rel v. Com'rs. Licking Co.*, 396

5. Where it appears that such certificate has been filed in ample time in which to advertise for bids and print the ballots, and no objection is made otherwise, except as to the precise time in which it was done, and that the non-observance in this regard could not affect the result of the election, its fairness or honesty, such certificate so filed will be deemed to be filed in time, notwithstanding the requirement of the statute is mandatory in form. *Ib.*

6. The duty imposed by sec. 13 (93 O. L. 190), relative to the transmission of certified copies of certificates of nomination, is legally performed when such board has duly certified the original certificate instead of a copy thereof as provided by this section. *Ib.*

**EMPLOYER & EMPLOYEE.**

1. Liability for defects in appliances—The employer is not a guarantor of the sufficiency of all the appliances furnished the workman for use, but he must use ordinary and reasonable care in providing safe appliances. *Schaal v. Heck.* 38

2. A Workman takes his chances in working in a dangerous place or situation regarding which he knows the facts, yet he is not chargeable with the risk to the same extent as is the master. He is not under the same obligation to search for hidden defects or possible dangers as is the master. *Ib.*

Blacklisting employe—Liability for damages—See Railroad.

**EQUITY—See also Appeal.**

1. An equitable action will not lie in Ohio for the recovery of personal property. *Ireland v. Loomis, ad.*, 37

**ERROR—See Appeal, Error & Review.****EVIDENCE.**

1. Sec. 5242a, R. S., as amended, providing that whenever a witness, after testifying orally, dies or is beyond the jurisdiction of the court and his testimony can not be obtained in any manner, the stenographer's minutes of the testimony taken at a preceding trial shall be admissible in evidence, is not in violation of the constitutional provision that one charged with crime should meet the witness face to face. *Deveaux v. Clemens*, 33

2. Counsel has no right to interfere by questions, etc., with the examination of witnesses by adverse counsel, but should wait until his turn comes to examine the witness; yet this is a matter in the discretion of the court, and where it does not appear to have been prejudicial to the party, it will not be sufficient ground for a reversal of the judgment. *Schaal v. Heck*, 38

3. Where the danger was so plain and obvious that any ordi-

**EVIDENCE—Continued.**

nary workman could notice it, expert testimony not be admitted. Ib.

4. Res Gesta—Expressions of party after occurrence—Admission of evidence for erroneous reason, when not ground for reversal of judgment. *Schaal v. Heck*, 38

5. Contract partly printed and partly written—Writing controls. *Fort Orange Oil Co. v. Wichman*, 57

6. Proof of administrator's bond where execution denied by sureties—The production of certified copy would be prima facie evidence of execution of bond, but where it is attempted to prove original bond, satisfactory evidence of signature of bondsmen required. *Newberger v. Finney*, 215

7. Hypothetical questions—A hypothetical question must be based upon facts assumed to have been proved in the case. *Com'rs. v. Com'rs.*, 363

8. Dying declarations—Admissibility—See Criminal Law.

9. Evidence by the prosecution tending to show improper relations between the accused and the wife of the deceased is admissible to show the motive for the shooting. But in such case the defense has the right to introduce evidence showing the character and reputation of the wife as a pure and virtuous woman, to disprove such improper relations, and the refusal by the court to admit such evidence is error. *Martin v. State*, 406

10. Possession of the stolen property, soon after the burglary and larceny was committed, is not of itself sufficient to warrant a conviction of defendant, but to warrant such conviction there must be some competent evidence, implicating defendant in the crime, in addition to the act of possession. *Blaney v. State*, 486

11. Oral declarations made on or before the execution of a written instrument, are not admissible in evidence to show an intention or purpose not therein expressed, although the ambiguity in the instrument may make the purposes or intention of the parties uncertain. *Nat'l. Bank v. Central Chandler Co.*, 443

12. Where a transaction affecting title to property evidenced by a written instrument is under investigation in a court of equity, and the question to be determined is whether an unconditional conveyance of the title or a mortgage or pledge to secure a loan was intended, evidence of oral agreements and conversations of the parties prior to and contemporaneous with the execution of the instrument will be admitted for the purpose of determining the true character of the transaction. But *quaere*, where the instrument is accompanied by a writing, which has no mark of incompleteness, but seems to give a full record of the transaction and the terms upon which the property conveyed in the instrument should be held by the transferee or redeemed by the transferor—will oral evidence be admitted also tending to show a different intent than that expressed therein? Ib.

13. A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence. *Royal Ins Co. v. Walrath*, 509

**EVIDENCE—Continued.**

14. The same rules apply to testimony in rebuttal as to testimony in chief. *Meeker v. Browning*, 548

15. Information in book of commercial agency, in general use at the time among commercial men and to which the party has access, containing the information that the words "& Co." in a name under which a party does business, are nominal only, it is a circumstance showing notice which should go to the jury, and it is error in the court to exclude it from the evidence. *Crosier v. McNeal*, 644

16. Testimony—Rule as to weighing same—Where witnesses on one side of a controversy give testimony which is reasonable and consistent with itself, and other witnesses on the other side contradict the testimony and testify to the contrary matter, it is not proper to disturb the finding of the jury either way, though their finding is contrary to the testimony of the greater number of witnesses. But the probative force of the testimony of any witness is not derived solely from his direct deposition as to any given matter, but is rather the final result of all his averments bearing on the matter, when considered and analyzed with reference to known circumstances and facts. This may leave the matter supported not by the full force of the witness' observations, but only by such strength as is left in them after they have been weakened by the other statements of the witness himself, or by the known and settled order of things. *Santschi v. Gendron Wheel Co.*, 723

**EXCEPTION.**

1. Where it is attempted to prove custom, and on objection the testimony is ruled out, to save the exception the party offering such testimony should state to the court what it is proposed and expected to prove by the witness. *Meeker v. Browning*, 548

**FORFEITURE—See Gas & Oil Leases.**

**GAMBLING.**

1. Playing billiard, the loser to pay for the use of the billiard, is not gambling under sec. 3946, R. S. *Steuer v. Royal Cigar Co.*, 82

**GARNISHMENT.**

1. Garnishment of executor or administrator for money coming to legatee admissible under sec. 5531, R. S., provided that upon final settlement of the testator's estate there shall be money in the hands of such executor or administrator with which to pay such legacy. *Sampsell, ad'r v. Sampsell*, 455

2. Where garnishee process has been served upon an executor or an administrator with the will annexed, in a suit brought against a legatee, and it appears from the answer of the garnishee that, though the estate has not been settled, there will upon settlement, be money in the hands of such executor or administrator with which to pay the legacy, a motion to dissolve the attachment and discharge the garnishee, where the only ground for such motion is that a legacy so held is not subject to garnishment, should be overruled. *Ib.*

**GAS & OIL LEASES—See Mining.**

**GAS WORKS.**

1. Gas trustees—Incidental powers in management of gas

**GAS WORKS—Continued.**

works—When a city has under the law acquired a gas plant, the power to operate the plant and to do the things necessary to accomplish the purpose for which the plant has been acquired, and to preserve the property from destruction and impairment to a degree not amounting to rebuilding or extension, is incident to and goes with the power to own as a current necessity. *Findlay (City) v. Parker et al.* 294

2. Same—Current expenses not within Burns law. Ib.
3. Gas trustees are city officers. Ib.
4. Gas trustees as individuals can not deal with board. Ib.
5. Same—Employment of former member by board within one year of expiration of term of office inadmissible. Ib.

**GIFT.**

1. E. O. Warner, having a daughter Marjorie three years of age, and being the owner of two coupon bonds, each for \$500.00, endorsed upon each of said bonds the words "This bond I give and set over to my daughter Marjorie Warner this 20 Dec., 1878. E. O. Warner." From the date of such endorsement said bonds were in the keeping of Marjorie's mother until the death of E. O. Warner, which occurred in March, 1884. Held: sufficient to establish a completed gift of the bonds to the daughter. *Rote v. Warner,* 350

**GUARANTY.**

1. A guaranty is binding and enforceable as to past transactions or advances though as to these alone it may be without consideration, if it also covers and is supported by the consideration arising out of future transactions or advances. *Smith v. Butler & Ward Co.,* 68
2. Whether the principle that "the promise to do or the doing of that which one is already under legal obligation to do, does not form a consideration for a promise," applies to a promise made by a third person to whom the promisee was not originally bound—Quere. Ib.

**HEIR.**

1. Construction of will—"Heir" used for "issue"—Vesting of fee simple estate depending on birth of issue. *Moore v. Feig,* 27

**HUSBAND & WIFE.**

1. Where it appears that land bought by a husband was paid for with money which he obtained as the distributive share of his wife in her father's estate, but under the law as it stood at the time, (thirty-five years ago), money of the wife reduced by the husband to his possession became his property, and it does not clearly appear that there was an understanding between husband and wife at the time that the land, bought by the husband with the money thus coming to him from his wife, should be held by him in trust for her, there exists no trust for the wife in such land. *Boyer v. Davis,* 191

**INFANT.**

1. Injury to infant while at work at railroad, engaged by an agent of R. R. Co. to do his work, without authority from Co.—Right to recover damages from R. R. Co. *C. T. & V'y. R. R. Co. v. Marsh,* 1

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INJUNCTION.

1. Appeal to circuit court from order of common pleas vacating injunction—See Appeal. *Kewish v. Wire* 386

## INSURANCE, FIRE.

1. Waiver of proof of loss—May be shown on averment that insured complied with conditions—Where, in a suit on a fire insurance policy requiring proof of loss forthwith, it appeared that the proof had only been made nine months after the loss, while the petition generally averred compliance with all the conditions, evidence of proof of waiver of that condition by the company, will be admissible at the trial, although no such waiver is specially alleged in the petition. *Eureka F. & M. Ins. Co. v. Baldwin*, 143

2. Occupation of house—What will amount to—Where the policy contains a provision that it shall be void if the house becomes unoccupied, and it appears that since the last tenant left the house, the son of the owner, who was employed during the night in a R. R. yard, slept in the house during every day, the house will not be considered unoccupied within the meaning of the policy. *Ib.*

3. What constitutes occupation of a house is a question of law for the court. Whether the facts shown will amount to occupation within the meaning of the law is a question for the jury. *Ib.*

4. Where several items of personal property are insured in one policy, the amount of insurance for each being severally stated, yet it is one contract of insurance, and where loss occurs, several suits to recover the insurance for each item can not be maintained. A suit on one item insured in such policy, is a bar to other suits for the other items. *N. British & Mer. Ins. Co. v. Cohn*, 185

5. Where suit is brought in the common pleas upon such policy to recover the insurance for one of the items insured therein, and subsequently another suit is brought before a J. P. to recover the insurance for another item insured therein, in which latter suit a judgment is recovered first, such judgment recovered before the J. P. will be a bar to the action pending in the common pleas. *Ib.*

6. A policy holder in a mutual fire insurance company, by the terms of his premium note and the stipulations of the policy, was bound for indebtedness of the company incurred during the life of the policy. The policy and his premium note was cancelled, and surrendered to him. After this a receiver for the company was appointed. Held, That although defendant is not excused from liability for indebtedness incurred during the life of the policy; yet his relation to the company is not such that he is represented by the receiver and the court thereby acquired jurisdiction of his person in a proceeding to wind up the affairs of the company, and to make assessments to pay its debts. *Wilhelm & Son v. Parker, Rec'r.*, 234

7. Parol evidence is admissible to show what property was included in the contract of insurance; and what was said and done by the parties up to the making of the contract. *Royal Ins. Co. v. Walrath*, 509

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**LEASE—Continued.**

he offers to take the premises for ten years more, at the same rates, which offer is accepted by the lessor, the parties by the word "rates" clearly meant the same terms and conditions as in the former lease, and the terms and conditions in the new lease are not so indefinite as to make the agreement for a new lease for ten years too indefinite to be enforced by the court. *Neel v. McCreery*, 612

5. Where the lessee is given possession of the premises, he is not entitled to damages from the lessor for failure to execute a lease for the term agreed upon between the parties. *Ib.*

**LIENS.**

1. Marshaling liens—Two parties having liens on same property, where one also has lien on other property. *Jennings v. Natl'. Bank*, 664

**LIFE TENANT.**

1. A tenant for life has no right to operate for oil or gas, on the premises, or to make an oil or gas lease thereon, when operations for oil or gas were not commenced before the life estate accrued. *Kenton Gas & El. Co. v. Dorney*, 101

**LIGHTING RAILROAD TRACKS—See Railroad.****MANDAMUS.**

1. Where, in an action for a writ of mandamus, it is averred by the relator that the lower court refused on motion property made to order certain process on a final judgment heretofore rendered by the court, to which relator claims to be entitled, his remedy is by petition in error in a higher court, and not by a petition for a writ of mandamus. *State ex rel. v. Pike*, 624

2. When all the requirements of sec. 795, R. S., have been performed by county commissioners, so that nothing remains to be done but to ascertain the lowest bidder, it becomes the legal duty of the commissioners to award the contract to such lowest bidder; and mandamus lies to compel such award. *State ex rel. Leonard v. Com's.*, 370

3. In such proceeding the commissioners should not, and cannot be required to, award a contract to the lowest bidder, until a good and sufficient bond, properly conditioned, is first given. *Ib.*

**MARRIED WOMAN.**

1. Secs. 4996 & 5319, R. S., providing that a married woman shall be sued as if unmarried, and that when so sued like proceedings shall be had and judgment rendered as if she were unmarried, afford the exclusive remedy for enforcement of the contracts of married woman. *Sanders v. Shepherd*, 503

2. Courts of equity have no jurisdiction to decree a specific lien on particular property for an amount due on the contract of a married woman made by her since the enactment of those statutes. *Ib.*

3. A suit on such a contract is, under those statutes, at law, and the relief is a personal judgment enforceable by an execution and levy. *Ib.*



**MARSHALING LIENS.**

1. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. But this rule must be taken with the modification that in his application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, and that no superior equities of others are interfered with. And where the lien of the junior lienholder accrued after the senior lienholder had obtained judgment of sale of the property, it is not competent for such junior judgment creditor, whether party to the action or not, to come in and attempt by a subsequent levy under his judgment to displace the rights of the senior judgment creditor to have the property appropriated to their earlier judgment. *Jennings v. Nat'l. Bank*, 664

**MECHANICS' LIEN.**

1. Bond of contractor for government work—Obligation to pay for "materials" used in the work—Scrapers not "materials" within meaning of bond. *Barclay v. Salmon*, 152

**MINING.**

1. Provisions as to "location money" construed, and held to apply to such wells only as lessee was by the terms of the lease required to drill. *Fort Orange Oil Co. v. Wichman*, 57

2. Gas and oil lease construed—Forfeiture—Where the owner of real estate made a lease, granting the underlying gas and oil, with the right to drill wells in order to procure said products, which, if obtained, were to be divided between the lessor and lessee in certain stipulated ratios, and where the lease contained the provision that if no well is completed within one year from the date of the lease, then the grant shall be null and void, unless the lessee shall pay to the lessor, a certain amount of money agreed upon, for each year thereafter that such completion is delayed, and where the lessee did not complete a well within the year from the date of the lease and did not pay or tender the amount of money agreed upon until after the expiration of the year next after the date of the lease, which was then refused by the lessor, held: 1st. That the lease became forfeited by virtue of its own provisions, and is void, and an election on the part of the lessor to terminate it, is not required. *Kenton Gas & El. Co. v. Dorney*, 101

3. Lessor's option of forfeiture—In such case, the making of another or second lease of the same real estate, for the same purposes, after the expiration of the year stated in the above provision, to a third party, would be evidence of an exercise of an option to forfeit the first lease and of an election to terminate it. *Ib.*

4. Life tenant can not grant oil and gas lease—A tenant for life has no right to operate for oil or gas, on the premises in which such estate is held, or to make an oil or gas lease thereon, when operations for oil or gas were not commenced before the life estate accrued. *Ib.*

5. Location money—Agreement set out construed as amounting to a release of location money. *Meeker v. Brown-ing*, 548

**MORTGAGE.**

1. In an action to foreclose a mortgage, there can be no personal judgment against the mortgagor for the amount of the debt secured by the mortgage, or any part thereof, unless the mortgagor is personally liable for such debt or for some part of it. If a person executes a mortgage to secure a debt for which he has not made himself liable, the mortgagee, so far as the mortgagor is concerned, can look only to the property so mortgaged. *McHenry v. Batavia Bl'dg. Ass'n.*, 208

2. Property was purchased by a guardian with the money of his wards, but the deed was executed in the name of the guardian individually, who gave his individual notes and mortgage for the balance of the purchase money, the understanding being that the guardian would afterwards convey to the wards, of all of which the vendor had full knowledge. The deed actually so made by the guardian to the wards, however, was never delivered to them, and afterwards the guardian conveyed the land to his wife who made an assignment for the benefit of her creditors, and the assignee commenced proceedings to sell the land. The vendor of the land had before that assigned the mortgage and notes to different innocent parties. Held, as between such innocent assignees of the mortgage and notes, and the wards, that the lien of such assignees of the mortgage and notes was superior to the equitable lien of the wards. *Hutchinson v. McCarron*, 500

**NEGLIGENCE.**

1. Injury to infant while at work at railroad under employment by one of employes of railroad, to do his work, without knowledge or authority of R. R. Co.—Liability of R. R. Co. *C. 1. & V'y. R. R. Co. v. Marsh*, 1

2. Injury to apprentice—Where the workman injured was an apprentice, yet if he had ordinary intelligence, he was bound to apply it, and if by the exercise of ordinary care he could have known the conditions he was working under, he is presumed to know them, and the law charges him with such knowledge. *Schaal v. Heck*, 88

3. Liability of railroad for injury notwithstanding contributory negligence of injured. *C. H. & D. R. R. Co. v. Murphy, ad'r.*, 228

4. Injury from defective sidewalk—Where defect is in original construction, city not entitled to notice. *Alliance v. Campbell*, 595

5. Rules of R. R. Co.—Violation of, as cause of injury to employe. *Mich. C. R. R. Co. v. Shea, ad'r.*, 574

6. Injury from defect in sidewalk—What charges not improper. *Toledo v. Ulopek*, 585

7. Where the employes on a street car fail to stop the car at a railroad crossing as required and within the distance from the railroad tracks provided by the act of May 4, 1891, and the gatekeeper of the gates provided at such crossing also fails to lower the gates to prevent the car from crossing, and a collision occurs in consequence thereof in which a passenger is injured, both the street R. R. Co. and the Railroad Co. are liable for damages. *C. H. & D. R. R. Co. v. Curtis*, 562

8. Collision of street car with locomotive at crossing—Fact of collision raises presumption of negligence. *Ib.*

**NEGLIGENCE—Continued.**

9. Railroad—Injury to employe in coupling cars—Defect in drawbar of car—Attempt of employe to remedy defect as contributory negligence—Jury to say whether defect in car or attempt of employe to remedy defect under all the circumstances was proximate cause of injury. *Ib.* 554

10. Rules of Railroad Co.—Injury to employe in consequence of non-observance of rules, in coupling cars with hand. *L. S. & M. S. R. R. Co. v. Ney,* 677

11. Boy on railroad track—Trespass—Not entitled to damages for injury. *Engelman v. The L. S. & M. S. Ry. Co.,* 731

**NON-RESIDENT.**

1. Jurisdiction over a non-resident party can not be obtained by simply averring a joint liability with a resident of the county in which the suit is brought, where the evidence fails to show such joint liability; and this notwithstanding the fact that such non-resident has only interposed a general denial, without pleading the improper joinder and service. *McDonald v. Beardman,* 209

**NUISANCE.**

1. Injuries resulting to the use of plaintiff's property by reason of the turning of water upon the property by embankment erected by the city, which otherwise would flow off, constitute a continuing nuisance upon which suit may be brought from time to time, and in which the plaintiff can recover damages for the injury suffered up to the time of commencement of the action, and in which the defendant might plead the statute of limitations as to injuries suffered more than four years prior to the commencement of the suit. *Toledo v. Lewis,* 588

**OFFICER DE FACTO AND DE JURE.**

1. A "judge and justice of the peace", elected, commissioned and qualified under sec. 621-1, R. S., is at least a de facto officer, *colore officii*, and against all but the state an officer de jure; and his title to his office cannot be questioned otherwise than by proceedings in quo warranto. *Gitsky v. Newton,* 484

**PARTNERSHIP.**

1. Where one partner, to secure his individual debt, or the debt of an outsider, uses the name of the firm without authority from his co-partners, under such circumstances that the payee has actual or constructive notice that the firm name was so used not for the benefit or for the business of the firm, to hold the other partners liable, the burden is on the payee to show that such other partners assented either before or after the execution or endorsement of the note or bill, and that the firm name was used either with their approval, or that they afterwards ratified it. *Penfield v. Mason,* 165

2. Dissolution—Notice to former dealers—The rule relating to notice of the dissolution of a partnership is essentially different as applied to former dealers with a firm, from the rule which relates to subsequent dealers only. If the retiring partner desires to exempt himself from liability for the debts of the new firm, contracted with a dealer of the old firm, he

**PARTNERSHIP—Continued.**

must cause actual notice of his retirement from the firm to be given to such former dealer. But if the former dealer gets the information from any source of the dissolution of the firm, it would answer the purpose, so it be actual notice. *Crossler v. McNeal*, 644

3. Who not to be considered former dealer—Where two partnership firms had had some dealings together, and four years, during which time both of the firms had been dissolved, had elapsed since the remaining member of one of the firms, who continued its business, had dealings with one of the members of the other dissolved firm, the latter will not be considered a "former dealer" so as to entitle him to actual notice of the dissolution of the other partnership. *Ib.* 614

**PLEDGE.**

1. To constitute transfer of property, absolute on its face, a pledge merely, it is not necessary that an express promise on the part of the transferer to repay the money should appear. *National Bank v. Central Chandelier Co.*, 443

2. Facts under which a transfer of stock, absolute on its face, was held to be a pledge of the same merely. *Ib.*

**PROBATE COURT.**

1. An act conferring special power on the probate court of one county is constitutional, while an act conferring special powers on the common pleas or circuit court in one county, would be unconstitutional. *Gill v. Sealbridge*, 390

**PROCESS.**

1. Service of process—Return on duplicate writ proper—Secs. 5041 & 5042, R. S.—Personal service, by the sheriff or his deputy, of the original writ of summons upon a defendant, and the proper return thereof made by such officer on a duplicate writ issued by the clerk of the court, is a substantial compliance with sections 5041 & 5042, Revised Statutes, and is a valid service. *Gould v. Rose*, 181

**PUBLIC BUILDING.**

1. Addition to public building—Steam heating plant will not amount to—Sec. 795, R. S., controls in constructing same. *State ex rel. v. Com'rs. Crawford Co.*, 370

**QUO WARRANTO.**

1. A "judge and justice of the peace", elected, commissioned and qualified under sec. 621-1, R. S., is at least a de facto officer, *colore officii*, and against all but the state an officer de jure; and the title of his office cannot be questioned otherwise than by proceedings in quo warranto. *Gitsky v. Newton*, 484

**RAILROAD.**

1. An infant of between ten and eleven years of age, who is injured by the negligence of the employes of a railroad company while in the discharge of their work as such employes, is not necessarily precluded from a recovery against such company for such injuries, by the fact that at the time of such injury such infant was in the performance of work which it was the duty of an agent of the company to perform

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RAILROAD—Continued.

the infant being engaged in such work by the employment of such agent of the company without any knowledge on the part of the company, and such agent being without authority from the company to so employ such infant. *O. T. & V'y. R. R. Co. v. Marsh*, 1

2. Blacklisting employe—Where railroad companies mutually agree that they will not employ any workmen who may have been discharged from or may have quit the service of any of the companies, parties to such agreement, unless the applicant shall present a consent from the parties for whom he last worked, or a "clearance", showing that he did not engage in a certain strike, it becomes the duty of a company, party to such agreement, upon the discharge of an employe who did not engage in such strike, upon his application therefor to furnish to him evidence of its consent to his employment by such other company, or a "clearance" card showing that he did not engage in such strike; and a failure to do so, whereby such person is prevented from obtaining employment which such other company, constitutes an actionable wrong, and compensatory damages may be recovered therefor; and if such consent or letter shall be withheld maliciously, exemplary damages may be awarded. *N. Y., C. & St. L. Ry. Co. v. Schaffer*, 77

3. Railroad fare—Computation of fractions of mile—The provision contained in the last clause of sec. 3374, R. S., as follows: "But the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," is not ambiguous or obscure, and interpretation or construction thereof, is not necessary or permissible. *Wells v. C., C. & St. L. R. R. Co.*, 201

4. Same—The clear and plain sense and meaning of the provision is: That multiple of five in closest proximity—nearest to—the result obtained by multiplying the rate by the distance, whether such multiple be nearest above or below such result. *Ib.*

5. Where a street is used by the public and a railroad jointly, the public is entitled to the use of any part of the street; but the fact that the railroad is also entitled to the use thereof and thus makes the use by the public dangerous, calls for a high degree of care by those using it to avoid such danger. *C. H. & D. R. R. Co. v. Murphy, ad'r.*, 223

6. If the railroad by its employes in charge of the train, knows a party to be in a perilous position, and might, after obtaining this knowledge, by the use of ordinary care have avoided the injury to him, and did not do so, then such party is entitled to recover notwithstanding he imprudently placed himself in the position of peril. *C. H. & D. R. R. Co. v. Murphy*, *Ib.*

7. A railroad is not required that the very moment a person is seen on the track every reasonable effort must be made to stop the train. The presumption would be, that such person is possessed of the ordinary senses of mankind, that he can hear and see, and when notified by the whistle or bell of the engine, or the noise made by the train itself, that he will leave the track in time to escape from the threatened danger, and the trainmen are justified in acting upon this pre-

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**RAILROAD—Continued.**

sumption until the contrary appears to be the case, using due care in the premises. But if there is anything disclosed which raises a suspicion that the person is deaf, or blind, or helpless, then the obligation on the part of the trainmen to use all necessary and proper care to avoid injury by stopping the train, if necessary to do so, immediately arises. *Ib.*

8. The non-observance of one of the rules of a railroad company will not of itself render the company liable for injury to one of its brakemen unless it is shown that the dispensing with such rule of the company was the proximate cause of the injury. *Mich. C. R. R. Co. v. Shea, ad'r.,* 574

9. It is not necessary that a street should be placed in prime condition for public travel in order to lay upon a railroad company passing over it the obligation to maintain a bridge over it. *Toledo v. L. S. & M. S. R. R. Co.,* 265

10. In an action to compel a R. R. Co. to maintain a sufficient bridge where its track passes over a public street, the R. R. Co. denied its liability to construct and maintain such a bridge, on the ground that when its right of way was located there, there was no public street at that point: that such street was opened there after the location of the railroad, and that the erection of the bridge there forty years ago, was merely an act of complaisance on its part towards the public. Held, that although the evidence whether there was a public street at this point at the time the railroad and bridge there was constructed was doubtful, yet from the fact of the continuation of this condition and the acquiescence of all the parties therein for forty years, the court holds the R. R. Co. liable to maintain the bridge at that point. *Ib.*

11. Where it appeared from plaintiff's evidence that the deceased, with other boys, for no purpose connected with the railroad company, or its operations, or business or interest, and without the consent of his parents, but against the warning of his mother, went upon the railroad tracks of the defendant to amuse himself with these other boys, and to pick up coal and carry it away, and was apparently in the act of stooping to pick up coal when he was struck dead by the train which came up behind him, it is a case in which the deceased if he had survived would not have been entitled to damages from the R. R. Co., and is it proper for the court, on motion of the defendant R. R. Co., to instruct the jury to return a verdict for defendant. *Engelman, ad'r., v. L. S. & M. S. R. R. Co.,* 731

12. Where one is wrongfully ejected from a railway train, even in the absence of the use of excessive force by the servants of the railroad company, and whether or not the relation of the parties originated in contract, he may seek his remedy as for tort. *T. & O. C. R. R. Co. v. Marsh,* 379

13. R. R. car lease—Insolvency of R. R.—Rights of car lessors—Where the court appoints receivers of the property of a railroad company, and directs them to join the company in the execution of a lease, consolidating former leases of rolling stock the terms of which have not yet expired, the purpose and provisions of which consolidated lease are to provide a lower monthly rental and extend the period of the leases—but leaving the title to the rolling stock in the lessors, with con-



**RAILROAD—Continued.**

ditions of forfeiture for non-payment of the rentals and other breaches of the covenants, such consolidated lease is not a sale of the rolling stock to the receivers, and the lessors are entitled to preference over the bonded indebtedness of the railroad company, only for the rentals which accrue after execution of such consolidated lease and during the existence of the receivership. *Central Trust Co. v. Ohio So. R. R. Co.*, 638

14. Plaintiff had entered into an agreement with the Railroad Co., to avoid the vexation of legal proceedings, to convey to them the right of way through his land at a certain price per acre, he agreeing to take such purchase money in shares of the capital stock of the Railroad Co. if the same should at the end of two years be worth its face value, otherwise to be paid in cash. The stock being of no value at the end of two years, he demanded the cash, which was refused, and suit brought to enforce vendor's lien. Held, that plaintiff is entitled to a vendor's lien, and to enforce the same as against subsequent purchasers of the road under foreclosure proceedings to which he was not a party. *Ames v. Wh. & L. E. R. R. Co.*, 684

15. Same—Order for sale of entire road proper—To enforce the vendor's lien, the proper remedy is an order of sale of the railroad as an entirety. (*Railroad Co. v. Lewton*, 20 Ohio St., 401.) Ib.

16. Where the rules of a Railroad Co., known to the employe, require its employes in coupling cars to use a stick, for which purpose sticks are provided by the company and would have been furnished to plaintiff if he had asked for one; and the testimony shows that the coupling in question, in making which the employe was injured, could and should have been made by the use of a stick, such employe is not entitled to recover for an injury received while attempting to make such coupling by hand, in disregard of the rules of the company. *L. S. & M. S. R. R. Co. v. Ney*, 677

**REFEREE.**

1. Where, under sec. 5210, R. S., the court appoints a referee to hear and determine all the issues of fact and law in a case, and to report his findings of fact and conclusions of law separately, a party desiring to review in the higher court the findings of fact on the weight of the evidence, should ask the referee for a new trial by motion containing the proper ground for that purpose, and if it be overruled, except thereto; and further, that to obtain a review of any errors committed on the trial, a bill of exceptions must be tendered to and signed by the referee. *Guthrie & Sons v. Angosta Milling Co.*, 256

**REPEAL.**

1. When the repealing clause in an amendatory act of legislature which is held unconstitutional, is also invalid, former law remains in force. *State ex rel. v. Buckley*, 86

2. The repealing clause in the act of 1896, amending sec. 2926b, repeals the election laws theretofore existing. As sec. 2926b, as amended, is unconstitutional and void, if the repealing clause therein, would remain in force, there would be no

**REPEAL—Continued.**

laws to secure fair elections in Ohio. It is not reasonable to assume that such was the intention of the legislature, and the repealing clause of the act is therefore as well void as the rest of the act, and sec. 2926b as it stood before the passage of the amendatory act of 1896, remains therefore in force. *Ib.*

**RES GESTAE.**

1. An expression by one of the parties after the occurrence, being one of surprise, is not admissible as part of the *res gestae*. If however the expression was otherwise admissible under the state of the pleadings in the case, the fact that it was admitted for an erroneous reason would not warrant a reversal of the judgment. *Shaal v. Heck*, 38

**RIGHT OF WAY.**

1. Where one granted an estate, and in his deed reserved a right of way across it to a certain point, but made no mention of or reference to any estate to which it was to be appurtenant, or with which to be used, it is a way in gross, and is a personal right which is not the subject of a grant of others, or to inheritance. *Metzger v. Holwick*, 606

2. Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming it. The owner of a lot separated by four lots from a right of way, cannot claim the same as appurtenant to his lot. *Ib.*

**SCHOOL, PRIVATE.**

1. Public school property can not be assessed for construction of sidewalk or sewer in street on which it abuts. *Tol. B'd. Ed'n. v. Toledo*, 574

**SELF DEFENSE—See Criminal Law.****SHERIFF.**

1. Since the act of April 20th, 1868, S. & S., 734, sec 1218, R. S., the failure of a retiring sheriff to pay over to his successor in office all moneys received by him and remaining in his hands constitutes a breach of his official bond. *Woolard v. Favorite*, 72

2 The failure of a sheriff, on the order of the court to pay out to the party entitled, moneys in his hands as such officer does not, alone, constitute a breach of his official bond so as to make the sureties thereon liable. To have such effect, the party entitled to payment must make demand, or offer reasonable opportunity for such payment. *Ib.*

3. A sheriff serving a single term under two bonds in force successively, failing to pay over to his successor in office, moneys received and remaining in his hands as such officer, at the expiration of his term, makes breach of his official bond; and the bond last in force is liable for such breach, unless it be affirmatively shown that such breach became absolute during the existence of the first bond. *Ib.*

**SIDEWALK.**

1. Injury from defect in sidewalk—The city is not entitled to notice of such defect where the same was one in the original construction of the walk; but if it was not a defect in the original construction, then the city is entitled to actual



**SIDEWALK—Continued.**

notice, unless by reason of the publicity and the long continuance of this defect in the walk, and this is a question to be submitted to the jury. *Alliance v. Campbell*, 595

2. Where the defect is of a nature that it would not be apparent to a passer-by unless he happened to step on it, and it is not a defect in the original construction, the city would not be bound to take notice of it, unless an accident of a character to bring knowledge home to the municipality, occurred before the accident in question in the case at bar, or so many accidents of some character had occurred there as to bring home notice to the municipality. *Ib.*

3. Sidewalk laid by abutting owner—Liability of city. *Ib.*

4. Plank sidewalk—Duty to frequently inspect—A plank sidewalk will only last for a few years, and it is the duty of the municipal officers to exercise proper supervision and make proper examination of the same by going over it and testing it to discover defects. *Ib.*

**SINKING FUND COMMISSIONERS.**

1. Power of sinking fund commissioners of Cincinnati under sec. 2729a, R. S., to refund bonded indebtedness of the city—Respective authority of sinking fund commissioners and Trustees Southern R. R. as to funding bonds of Cin. So. R. R.—Contract for refunding must be performable within reasonable time—Refunding by sale of bonds, advertisement and competition required—Increase of amount of indebtedness not premissible. *Guckenberger v. Dexter*, 115

**STATUTE—See also Repeal.**

1. The uniformity in the operation of laws of a general nature required by the constitution is in the sense, that the law shall operate the same in all parts of the state under the same circumstances and conditions, and must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class. *State ex rel. v. Buckley*, 86

**STATUTE OF LIMITATIONS.**

Adverse possession as against municipal corporation—See Adverse Possession.

**STREETS & ALLEYS—See also Sidewalk.**

1. The occupation by abutting owners, of a street, by taking possession of the whole, including it within the boundaries of their land, using and occupying it as a part of their premises, selling and conveying it to purchasers for a valuable consideration, establishes adverse possession. *Mott v. Toledo*, 472

2. While an encroachment upon a street by a permanent building would establish adverse possession, a mere incroachment upon the street by the erection of a fence, or even a stonewall, would not do so. But the occupation of the entire street, to the exclusion of the public for all purposes for which the street was dedicated constitutes adverse possession, and if continued for twenty-one years, will bar the rights of the public to the street. *Ib.*

3. Intention of owner of land to dedicate to public use re-

**STREETS & ALLEYS—Continued.**

quisite to establish common law dedication. *Cherry v. How*, 246

4. Twenty-one years user by public will not amount to dedication where there was no intention to dedicate the land. *Ib.*

5. Cincinnati "Alley Law" (90 O. L.L., 238), unconstitutional as in conflict with sec. 2, art. 13, constitution, because it deprives owners of lots abutting on alleys of 20 feet or less in width in cities of the first grade of the first class, of right which owners of lots abutting on alleys generally enjoy under sec. 2293, R. S., and so far as alleys that were once improved and that are re-paved without changing the grade thereto, located in such cities, are concerned. *Longworth v. Cincinnati*, 15

**STREET IMPROVEMENT.**

1. Resolution to improve sidewalk in Cincinnati—Must be read on three different days. *Cincinnati v. Johnson*, 291

**STREET RAILROAD.**

1. Where a Street R. R. Co. contracts with another Street R. R. Co. whereby it permits the cars of such other company to run over its track, such other company cannot under such contract run the cars of a third company over the tracks of such first company. *T. & M. V'y. R. R. Co. v. Tol. Tract. Co.*, 22

2. Where a passenger on a street railroad car is carried beyond her destination in consequence of the failure of the conductor to notice her signal to stop, she still remains a passenger, and entitled to the care owing by the street railroad company to its passengers. *Tol. Cons'd. Str. Ry. Co. v. Fuller*, 562

3. Collision of street car with locomotive at crossing—Fact of collision raises presumption of negligence. *Ib.*

4. Under the act of May 4, 1894, 88 O. L., 581, requiring street cars to stop at railroad crossings and send a man ahead to see that the tracks are clear, the car and the horses attached to it are to be considered as one in calculating the distance from the railroad track at which the street car is required to stop by the statute. *Ib.*

5. Where the employees on a street car fail to stop the car at a railroad crossing as required and within the distance from the railroad tracks provided by the act of May 4, 1891, and the gatekeeper of the gates provided at such crossing also fails to lower the gates to prevent the car from crossing, and a collision occurs in consequence thereof in which a passenger is injured, both the street R. R. Co. and the Railroad Co. are liable for damages. *Ib.*

**SURETY.**

1. Where a principal and his sureties are sued together, and the principal being in default, but the sureties answer, and judgment is rendered against the sureties, but not against the principal (as should have been done), and the sureties take the case on error to the circuit court without joining the principal as a party to such error proceedings, such principal is not a necessary party thereto, and a motion to dismiss such proceedings for failure to make such principal a party there-

**SURETY—Continued.**

to, it being too late to make him a party, will be overruled.  
Newberger, Exr., v. Finney, adr., 215

**TAXATION.**

1. Under sec. 2781, R. S., the taxpayer does not make a false return, or evade making a return of his property, where he withholds such property from his list on the honest belief that the same is not taxable, coming to such belief upon the advice of eminent attorneys at law. *Adams v. Shields*, 129

2. The county auditor has not jurisdiction to act under sec. 2781, unless there has been a false return, or a return evaded within the meaning of the law. *Ib.*

3. Scrip certificates of corporation not property of stockholders until dividend declared, and until then are taxable by corporation, and not taxable in hands of stockholders. *Ib.*

**TESTIMONY—See also Evidence.**

1. Testimony at former trial—Witness not accessible, stenographers' notes competent. *DeVeaux v. Clemens*, 83

2. Expert testimony not proper where the danger was so plain and obvious that any ordinary workman could notice it, and expert testimony should in such case not be admitted. *Schaal v. Heck*, 88

3. Statement volunteered by a witness on matter not in issue under allegations of petition, to be ruled out. *Brandon v. L. S. & M. S. R. R. Co.*, 705

4. Recalling witness for further cross-examination at any stage of the trial, proper. *Ib.*

5. Witness to state facts, not opinions. *Ib.*

**TITLE.**

1. Conveyance or pledge—Admissibility of oral declarations to explain character of written instrument—*National Bank v. Central Chandelier Co.*, 443

**TORT.**

1. In awarding damages for a tort, the jury may include compensation by way of interest *Norton v. Parker*, 715

2. Where one is wrongfully ejected from a railway train, even in the absence of the use of excessive force by the servants of the railroad company, and whether or not the relation of the parties originated in contract, he may seek his remedy as for tort. *T. & O. C. R. R. Co. v. Marsh*, 379

3. When the force used to eject one from a R. R. train amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train, is not an element in the question of mere recovery. *Ib.*

**TRUST.**

1. Land bought by husband with money of his wife reduced to his possession under former law—No trust estate in wife. *Boyer v. Davis*, 191

2. Conveyance to guardian individually of land bought with ward's money—Innocent holder of mortgage and notes for balance of purchase money executed by guardian superior to equitable lien of wards. *Hutchinson v. McCarron*, 500

**VENDOR'S LIEN.**

1. Sale of right of way to R. R. Co.—Vendor's lien good as against subsequent purchasers. *Ames v. Wh. & L. E. R. R. Co.*, 684

**VENUE.**

1. Change of venue—Bias, etc., of judge—It is not necessary to incorporate an affidavit of the interest, bias or prejudice of a judge, made and filed as provided in section 550, R. S., into a bill of exceptions in order to bring it before a reviewing court, but it is sufficient to file it with the petition in error. *Barclay v. Salmon*, 152
2. It is not necessary in such an affidavit to state facts showing interest, bias or prejudice, but merely to aver interest, bias, prejudice or other disqualifying fact. *Ib.*
3. The right to file such recusation is not limited to cases in which all of the judges of a subdivision are so disqualified, but exists in every cause or matter, pending before the court of common pleas in any county, which may come before a judge so disqualified. *Ib.*

**VERDICT.**

1. A verdict for both the plaintiff and the defendant is not inconsistent if dual in form, and the separate findings are on the causes of action severally pleaded by them respectively. *Haus v. Koehler*, 536
2. Where, in an action for damages for a tort, the jury in its verdict specifies how much the damage amounted to at the time, and how much the interest thereon would amount to, giving the sum total as its verdict, such verdict would not be invalid on the ground that no interest can be allowed on damages for a tort. Under the authority of *Railroad v. Cobb*, 35 Ohio St., 94, the jury in awarding damages for such an injury may include compensation in the nature of interest. *Norton v. Parker*, 715

**WATER-WORKS COMMISSIONERS OF CINCINNATI.**

1. Plans, drawings and specifications for contracts for the new water-works in Cincinnati. The drawings and specifications need not go to the minutest details in every part of the machinery; but it is sufficient to give specific and minute specifications as to what the machinery is to accomplish, the exact kind of material to be used, the manner in which all the work should be done, and the exact nature and kind of all the parts which were given, how all such machinery should be constructed, such as valves, riveting, bolts, etc. *Ampt v. Cincinnati*, 516
2. Provisions for alternative bidding and for changes—There can be no objection to the provision in the contract as to alternative bidding, nor to the provisions therein by which alterations in the contract are provided for. *Ib.*

**WILL.**

1. Contest of will—Issue—The only issue that can be submitted to the jury in an action involving the setting aside of a will is, whether the writing produced by the proponents is the last will of the testator or not. *Windisch-Muhlhauser Br'g. Co. v. Opp*, 465

**WILL—Continued.**

2. In such an action, if the petition sufficiently directs the attention of the court to the fact that the validity of the will is challenged and that the proper parties are before it, it is for the court to see that the issue is made up, and submit that phase of the litigation to the jury, no matter what other causes of action may be asserted in the petition, or what other parties are drawn into the controversy by the pleadings. **Ib**

3. Manifestations of mental disturbance by the testator, though remote as to time, are not remote to the issue if, when connected with other evidence of mental weakness of recent date, they tend to reflect light upon testator's condition at the time the will is made. **Ib.**

4. Construction of will—"Heir" used for "issue"—Vesting of fee simple estate depending on birth of issue. *Moore v. Feig*, 27

5. Demonstrative legacy—A bequest of \$10,000, payable as follows: 20 shares of the capital stock of the First National Bank of Painesville, O., at \$2,000.00. \$1,000 in L. S. & M. S. Ry. Co. at par \$1,000.00. \$7,000.00 in money or good well secured notes—is a demonstrative legacy, and if the testator at his decease was not the owner of any L. S. & M. S. bonds or stocks, the legacy does not abate, but is payable out of assets covered by the residuary bequest, as are general legacies. *Rote v. Warner*, 342

6. Direct gift—The testator having, by his will, bequeathed to his wife in trust for M., his infant daughter, until she arrives at the age of majority, the sum of ten thousand dollars; by a codicil to his will, bequeathed to his said daughter M. "in addition to the sums provided for her in my will, one thousand dollars in money:" Held, the one thousand dollars in money given by the codicil, is a direct gift to M., and not to his wife in trust for M. until she arrives at the age of majority. **Ib.**

7. A testator, by his will, bequeathed to a trustee the sum of \$10,000, to be held in trust for his infant daughter until her majority, when it should be paid to such daughter, with provision as to its disposition in the event of the death of the daughter before attaining her majority, and in a codicil to such will he made a bequest to said daughter of the sum of \$1,000. The executors delivered to such trustee bonds of the value of \$1,000.00, supposing at the time of such delivery that said bonds were a part of the testator's estate, whereas in fact they were already the property of the daughter, and paying to said trustee the further sum of \$10,000.00 under the mistaken belief that said trustee was the proper custodian of the \$1,000.00 bequeathed by the codicil to the daughter. And the trustee having delivered said bonds to the daughter upon her attaining her majority, Held: that the executors had properly discharged the legacy made in the will, but that the legacy given by the codicil remained unpaid, and that said executors must pay to said daughter said sum of \$1,000.00 bequeathed by said codicil, together with interest from a date one year later than the date of the testamentary letters issued to such executors. *Rote v. Warner*, 350

8. Provision in husband's will for wife, made during wife's

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WILL—Continued.

life, lapses on her death her husband surviving—Wills were mutually made by a husband and wife who each owned property. At the same time they entered into a contract in writing, providing that the provisions of these wills should be unalterable and irrevocable "as between the parties to this contract". After the death of the wife the surviving husband changed his will. On his death the parties who would have been entitled to legacies under the husband's will as originally made and, as heirs of the wife, to the legacy made to her in such original will, claimed the legacies, by virtue of the provision of the contract that the will as originally made should be unalterable and irrevocable. Held, the provision in the contract "that the wills should remain unalterable and irrevocable as to the parties to the contract," only referred to the husband and wife as the only parties to the contract; and even if the husband's original will had remained in force, the provision for the wife made therein had lapsed by her death before the husband, and her heirs would not be entitled to anything under such will. Trustees Ref'd. Church v. Wise, 659

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Ex. 110.  
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